TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY, APPELLANT,

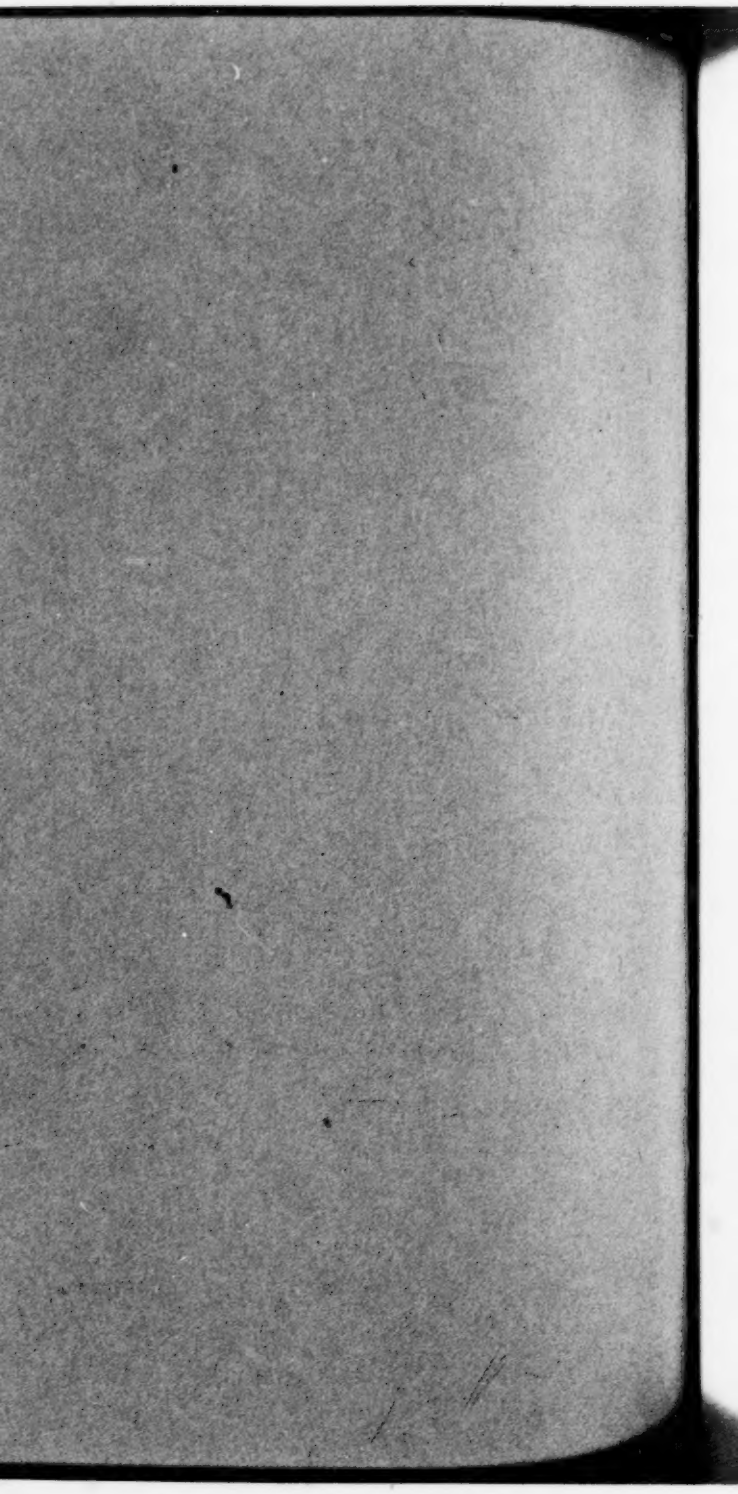
vs.

STATE OF MARYLAND

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

FILED JUNE 30, 1953

Probable jurisdiction noted October 12, 1953



BLEED THROUGH

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY, APPELLANT,

vs.

STATE OF MARYLAND

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 4, 1953.

—1336

[fols. 1-9]

IN THE SUPREME COURT OF BALTIMORE CITY

R. D.

File 24,968-24,969

Docket 1952

Folio 352

STATE OF MARYLAND, 34 Hopkins Place, Baltimore 1, Maryland,

v.

MILLER BROTHERS COMPANY, Wilmington, Delaware

AFFIDAVIT FOR ATTACHMENT AGAINST NON-RESIDENT OR ABSCONDING DEBTOR—Filed 19 March 1952

Be it Remembered, and it is hereby certified, that on this 19th day of March, in the year nineteen hundred and fifty-two, personally appeared before the subscriber, a Notary Public of the State of Maryland,

Edward F. Engelbert, Assistant Director, Retail Sales Tax Division, Office of the Comptroller, and made oath in due form of law that

Miller Brothers Company, Wilmington, Delaware, is justly and bona fide indebted unto the said State of Maryland, by reason of their failure and refusal to pay legally assessed deficiencies to the said State of Maryland, in Use Taxes justly due and owing, in the full and just sum of Three Hundred Fifty-six Dollars and Forty cents ($356.40), over and above all discounts. And at the same time the said Edward F. Engelbert produced to me a Statement of Account on and by which the said Miller Brothers Company is so indebted, which is hereunto annexed.

In testimony whereof, I hereunto set my hand and affix my Seal Notarial, the day and year aforesaid.

Jeanette M. Finnegan, Notary Public. (Notarial Seal.)

[fol. 10] IN THE SUPERIOR COURT OF BALTIMORE CITY

STATE OF MARYLAND, 34 Hopkins Place, Baltimore 1, Maryland,

against

MILLER BROTHERS COMPANY, Wilmington, Delaware

ACTION IN ATTACHMENT NAR (SHORT NOTE) AND STATEMENT OF ACCOUNT—Filed March 19, 1952

This suit is instituted to recover the sum of Three Hundred Fifty-six Dollars and Forty cents ($356.40) due and owing from the Defendant to the Plaintiff, for that under and by virtue of the Maryland Retail Sales and Use Tax Act, Sections 259 to 336, inclusive, of Article 81 of the Annotated Code of Maryland (1947 Supp.), the Comptroller has assessed a deficiency in Use Tax against the Defendant herein in the amount of $356.40 which said deficiency has become final; that there is due and owing to the Plaintiff the aforesaid sum of $356.40 as shown on the attached Statement of Account; that demand was made on the Defendant for payment of the said moneys but that the Defendant has refused and still refuses to pay the same.

Hall Hammond, Attorney General, Edward F. Engelbert, Asst. Dir. Retail Sales Tax Division, Office of the Comptroller, 34 Hopkins Place, Baltimore 1, Maryland.

[fol. 11] STATEMENT OF ACCOUNT

The following constitutes a true and perfect computation of Use Tax, interest and penalty due and owing by Miller Brothers Company, Wilmington, Delaware to the State of Maryland:

Computation of Use Tax:
Period Covered: July 1, 1947 thru

	December 31, 1951	$356.40
Tax due	$240.00	
Interest	32.40	
Penalty	84.00	$356.40

Edward F. Engelbert, Asst. Dir. Retail Sales Tax Division, Office of the Comptroller, 34 Hopkins Place, Baltimore 1, Maryland.

[fol. 12] IN THE SUPERIOR COURT OF BALTIMORE CITY

[Title omitted]

INSTRUCTIONS TO SHERIFF—filed March 19, 1952

Mr. Sheriff:

Please attach all motor vehicles belonging to the Defendant.

Hall Hammond, Attorney General, Edward F. Engelbert, Asst. Dir. Retail Sales Tax Division, Office of the Comptroller, 34 Hopkins Place, Baltimore 1, Maryland.

[fol. 13] IN THE SUPERIOR COURT OF BALTIMORE CITY

April R. D. 341

Docket 1952

File 24968

Folio 352

WRIT OF SUMMONS AND SHERIFF'S RETURN—March 19, 1952

Baltimore City, to wit: State of Maryland

To the Sheriff of Baltimore City, Greeting:

You are hereby commanded to summon Miller Brothers Company, Wilmington, Delaware to appear before the Superior Court of Baltimore City, to be held at the Court

House in the same city, on the First Monday of April next, to answer an action at the suit of State of Maryland, 34 Hopkins Place and have you then and there this writ.

Witness, the Honorable W. Conwell Smith, Chief Judge of the Supreme Bench of Baltimore City, the 14th day of January 1952.

Issued 19th day of March 1952.

(S.) M. Luther Pittman, Clerk.

Mr. Sheriff:

Copy of Short Note within to be set up at the Court House door.

Hall Hammond, Edward F. Engelbert, Attorneys for Plaintiff, 34 Hopkins Place, Address.

Sheriff's return:

Non Est. as to the defendant. Copy of the Short Note set up at the Court House door.

Joseph C. Deegan, Sheriff.

Fee: $.35.

[fol. 14] IN THE SUPERIOR COURT OF BALTIMORE CITY

WRIT OF ATTACHMENT AND SHERIFF'S RETURN

Attachment under Article 81, Section 259-336, Maryland 1947

April R.D. 342 Docket 1952

File 24969 Folio 352

State of Maryland,

To the Sheriff of Baltimore City, Greeting:

Whereas, State of Maryland, by its attorneys Hall Hammond and Edward F. Engelbert have appeared before the Clerk of the Superior Court of Baltimore City, and produced and filed in Court an affidavit of Edward F. Engelbert, Asst. Director, Retail Sales Tax Div. taken before Jeanette M. Finnegan, Notary Public in accordance with the Statute in such case made and provided, that a certain Miller Brothers Company bona fide indebted to him the said State of Maryland in the full and just sum of Three

Hundred Fifty-Six dollars and Forty cents, over and above all discounts, and that the said State of Maryland is credibly informed, and verily believes that the said Miller Brothers Company—not a citizen of the State of Maryland and do not reside therein. And at the same time the said Edward F. Engelbert produced and filed the account on and by which the said Miller Brothers Company is so indebted.

We Therefore Command You, *That you Attach the lands, tenements, goods, chattels and credits* on the said Miller Brothers Company to the value of Three Hundred Fifty-Six Dollars and Forty cents, current money and costs of this attachment, according to the form of the Code of Public General Laws in such cases made and provided. And we further command you, that you make known unto the person or persons in whose hands you shall lay this attachment, that he, she or they be and appear before the Judge of the Superior Court of Baltimore City, at the Court House in the same City, on the First Monday of April next, to show cause (if any he, she or they have) why the lands, tenements, goods, chattels and credits by you attached, by virtue of this writ, in his, her or their hands, shall not be condemned, and execution thereof had and made to and for the use of the said State of Maryland as of the lands, tenements, goods, chattels and credits of the aforesaid Miller Brothers Company according to the Code of Public General Laws in such cases made and provided, if to him, her or them it shall seem meet; and how you shall execute this writ, make known to the Judge of the Superior Court of Baltimore City, at the day and place aforesaid, and have you then and there this writ.

Witness, *the Honorable* W. Conwell Smith, *Chief Judge of the Supreme Bench of Baltimore City, the 14th day of January 1952.*

Issued *19th day of March, 1952.*

(S.) M. Luther Pittman, Clerk of the Superior Court of Baltimore City.

[fol. 15] Sheriff's return:

"Attached and levied as per Schedule herewith returned and the property attached Left in the Hands of Eglin's

Parking Lot, Liberty and Clay Streets, Baltimore, Maryland, on the 4th day of April, 1952."

Joseph C. Deegan, Sheriff.

Fee: $15.21.

Pursuant to an Order of Court dated April 4, 1952 and signed by Judge S. Ralph Warnken, the automobile (station wagon) taken into custody by the Sheriff was delivered into the custody of Piper and Marbury, Counsel for the defendant.

Joseph C. Deegan, Sheriff.

SUPERIOR COURT OF BALTIMORE CITY

You have been summoned to appear in Court on the First Monday of April, 1952. Personal attendance in Court on the day named is not required; but, unless within such number of days thereafter as the law limits, legal defense is made to the above mentioned suit, a judgment by default may be entered against you.

Apr. R.D. 342 Docket 1952

File 24969 Folio 352

STATE OF MARYLAND, 34 Hopkins Place,

vs.

MILLER BROTHERS COMPANY, WILMINGTON, DELAWARE

Attachment Under Act 1888

Costs $18.85 Pd.

Hall Hammond, Edward F. Engelbert, Att'y for Plaintiff, 34 Hopkins Place, Address.

debt	$356.40
ct. costs	18.85
	$375.25
Sher. fee	15.21
	$390.46

[fol. 16] A SCHEDULE

Of the Goods, Chattels, Lands, Tenements, and Credits of Miller Bros. Company, Wilmington, Delaware, seized and taken by virtue of a writ of Attachment under Act of 1888 issued out of the Superior Court of Baltimore City and to the Sheriff thereof, directed at the suit of the State of Maryland and appraised by said Sheriff and by us, the subscribers, who being first duly summoned and sworn for that purpose.

Given under our hands and seal, this 4th day of April, 1952.

1 Auto. 1951 Willys 800.00

Station Wagon
License # Del. C 4749

Joseph C. Deegan, Sheriff. (Seal.)

[fol. 17] IN THE SUPERIOR COURT OF BALTIMORE CITY

[Title omitted]

PETITION—Filed April 4, 1952

To the Honorable, the Judges of Said Court:

The Defendant in the above entitled attachment case, appearing specially for the purpose of praying that the writ of attachment be quashed and set aside, files this Petition and respectfully shows:

1. That the Defendant is a corporation duly organized and existing under the laws of the State of Delaware, and is an "absent defendant" within the meaning of Section 20 of Article 9 of the Annotated Code of Maryland, Edition of 1939.

2. That an attachment has issued from the Superior Court of Baltimore City commanding the Sheriff of Baltimore City to attach the lands, tenements, goods, chattels and credits of the Defendant; and that the return day of such attachment will be the seventh day of April, 1952.

Wherefore, the Defendant prays that the said writ of attachment be quashed and set aside for the following reasons:

(a) The use tax which the Plaintiff claims is due and owing by the Defendant to the Plaintiff consists of use taxes which Plaintiff claims the Defendant [fol. 18] was required, by the Maryland Use Tax Law (Sections 308 to 337, inclusive of Article 81 of the Annotated Code of Maryland, 1947 Cumulative Supplement (as amended)), to collect and pay to the Plaintiff on sales of certain tangible personal property made by the Defendant in the State of Delaware to Maryland purchasers. The Defendant has not engaged nor does it engage in any local activities in the State of Maryland which could be the basis for such a requirement. If the Maryland Use Tax Law be construed to require the Defendant to make said collections and payments, said Law is void because it violates (i) the due process clause of the Fourteenth Amendment to the Constitution of the United States of America, (ii) Article 23 of the Declaration of Rights of the Constitution of Maryland, and (iii) Section 8 (Commerce Clause) of Article I of the Constitution of the United States of America.

(b) That the Maryland Use Tax Law cannot properly be construed to require the Defendant to make said collections and payments.

(c) Other reasons to be shown at the hearing on this Petition.

The Defendant further prays (a) that the Sheriff of Baltimore City be ordered to return said writ and the proceedings thereunder immediately before this Court; and (b) that [fols. 19-20] this Court shall proceed to hear this Petition and adjudicate hereon.

James Piper, William L. Marbury, Piper & Marbury, Attorneys for Defendant, 1000 Maryland Trust Building, Calvert and Redwood Streets, Baltimore 2, Maryland.

Duly sworn to by Howard A. Miller. Jurat omitted in printing.

[fol. 21] IN THE SUPERIOR COURT OF BALTIMORE CITY

[Title omitted]

ANSWER TO PETITION TO QUASH WRIT OF ATTACHMENT—Filed April 8, 1952

To the Honorable, the Judge of Said Court:

The plaintiff, by Hall Hammond, Attorney General, Francis D. Murnaghan, Jr., Assistant Attorney General, and Edward F. Engelbert, Assistant Director, Retail Sales Tax Division, Office of the Comptroller, by way of answering the Petition says:

(1) The plaintiff admits the allegations contained in paragraphs 1 and 2.

(2) The plaintiff denies the allegations appearing in sentence one of sub-paragraph (a) of the Wherefore clause, insofar as it is alleged that sales of certain tangible personal property made by the defendant to Maryland purchasers were completed in the State of Delaware.

(3) The plaintiff denies the allegations contained in sentence 2 of sub-paragraph (a) of the Wherefore clause.

(4) The remainder of the Wherefore clause contains only conclusions of law and, therefore, requires no answer.

And answering further, the plaintiff says:

(5) On or about March 10, 1952, the Comptroller of the State of Maryland, pursuant to Sections 335 and 280 of Article 81 of the Annotated Code of Maryland (1939 Edition and 1947 Supplement, as amended), assessed a final deficiency in use tax against the defendant in the amount of $356.40, $240.00 thereof representing the use tax claimed to be due, $32.40 thereof interest claimed to be due, and $84.00 thereof penalties claimed to be due for the tax period from July 1, 1947, through December 31, 1951. The present suit, by way of attachment, was instituted in order to collect said [fol. 22] tax, interest and penalties.

(6) The defendant has neither applied for revision of said assessment nor paid the tax assessed and sought a refund, as required by Article 81, Sections 335 and 287 of the Annotated Code of Maryland (1939 Edition and 1947 Supplement, as amended).

Wherefore, the plaintiff prays that the Petition be dismissed because:

(a) Sections 335 and 286 of Article 81 of the Annotated Code provide that collection of sales and use taxes may be contested only by the proceeding set forth in Article 81, Sections 335, 287 and 288.

(b) The assessment, collection and payment of the tax here involved are authorized and required by Article 81, Sections 308 through 337, inclusive, of Article 81 of the Annotated Code, and such authorization and requirement do not violate any provisions of the Constitution of the United States of America or the Constitution of the State of Maryland.

(S.) Hall Hammond, Attorney General, Francis D. Murnaghan, Jr., Assistant Attorney General, Edward F. Engelbert, Attorneys for plaintiff.

Certificate of service (omitted in printing).

[fol. 23] In the Superior Court of Baltimore City

[Title omitted]

Agreed Statement of Facts—Filed May 22, 1952

It is hereby stipulated and agreed by and between the attorneys for the above named parties and on their behalf that:

1. Defendant, Miller Brothers Company, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Ninth and King Streets, Wilmington, Delaware. It has no resident agent in Maryland.

2. Defendant is and for all times material to this suit has been engaged in the retail household furniture business by selling its merchandise from its only retail store located in Wilmington, Delaware.

3. The only methods of advertising used by the Defendant are the following:

(a) *Radio and Television.* The Defendant has engaged in no radio or television advertising of any sort, anywhere, since January 1, 1951. Prior to that date, the Defendant had limited radio advertising over the Wilmington, Delaware, stations. In the fall of 1950, for a period of about six weeks, the Defendant had a small amount of television advertising over Station WDEL-TV in connection with the broadcasting of football scores. The facilities of those stations are located in Delaware entirely. In the [fol. 24] radio and television advertising the Defendant has never had any script or copy which made an appeal for out-of-state business or in any way was designed directly or indirectly to appeal particularly to Maryland residents. The radio slogan adopted by the Defendant was "Furniture Fashion Makers for Delaware".

(b) *Newspapers.* The Defendant advertises regularly in the Wilmington Morning News and the Wilmington Journal every evening. It also advertises occasionally in the Wilmington Sunday Star. All of these newspapers are published in Wilmington and undoubtedly have some circulation in some portions of Maryland. The volume of such circulation is unknown to either the Plaintiff or the Defendant. In its newspaper advertising the Defendant has never used advertising copy which mentions Maryland customers or is prepared for the purpose of directly or indirectly making any special appeal to the Maryland customers. No advertising has ever been done by the Defendant in any newspapers published in Maryland.

(c) *Use of the Mails.* The Defendant uses an automatic card mailing system and with this system distributes about four pieces a year. These mailing pieces go out to everyone who has purchased from the Defendant and whose name and address is on the Defendant's records. This means that Maryland residents do receive these mailing pieces, but no specific advertising copy has ever been sent through the mails for the specific purpose of attracting Maryland buyers. No advertising copy has been sent to Maryland buyers alone and the only advertising copy which these

Maryland buyers receive is that which is sent to all customers whose names and addresses are on the records.

4. Defendant has made and does make certain sales of tangible personal property, some of which sales being the [fol. 25] subject matter of this action, to residents of the State of Maryland, who have used, consumed or stored or will use, consume or store the purchased personal property in the State of Maryland.

5. The transactions between the Defendant and the said Maryland purchasers are and have been as follows:

(a) It is the Defendant's policy never to accept telephone orders. Most of the merchandise sold by the Defendant requires personal inspection and selection, and it is for this reason that telephone orders are refused. The Defendant maintains no mail-order business and does not make use of coupons in connection with its newspaper advertising.

(b) The purchaser appears at Defendant's retail store, located in Wilmington, Delaware. In about thirty per cent (30%) of the sales the exact item selected by the customer is tagged in the store and that same item is delivered to the customer from the store, in Wilmington, Delaware. In the remainder of the sales, an item identical to that selected by the customer is delivered from the Defendant's storeroom or warehouse in Wilmington, Delaware.

(c) Delivery is made in one of three ways and no other:

(1) The article is taken away by the purchaser. Within the taxable period of July 1, 1947, through December 31, 1951, tangible personal property sold for at least $2,500 was delivered in this manner.

(2) The article is delivered in Maryland to the purchaser in a motor vehicle owned and operated by Defendant, directly from Defendant's store in Wilmington, Delaware, to the residence of the Maryland purchaser. The cost of the delivery in such a case is borne by Defendant and no charge [fol. 26] therefor is made to the purchaser. Within the taxable period July 1, 1947, through December 31, 1951, tangible personal property sold for at least $8,000 was delivered in this manner.

(3) The article is delivered in Maryland to the purchaser

by common carrier to which delivery is made by Defendant in Wilmington, Delaware. Such common carrier is usually an independent trucking line authorized to do business as a commercial carrier by the Interstate Commerce Commission. The cost of the delivery in such a case is borne by the Defendant and no charge therefor is made to the purchaser. Within the taxable period July 1, 1947, through December 31, 1951, tangible personal property sold for at least $1,500 was delivered in this manner.

6. (a) Payment for some purchases is completed at the time the purchaser appears at the Defendant's retail store and prior to the delivery.

(b) The Defendant does make sales to some Maryland residents on credit in exactly the same way as it sells to Delaware residents on credit. In the case of most of such credit sales to Maryland customers, the Defendant enters into conditional sales contracts with its Maryland customers in the same way that it enters into conditional sales contracts with its Delaware customers. In many other instances, the Defendant notes the terms of the credit transaction on the sales slip without requiring a conditional sales agreement, and this method of business is used without any distinction between Maryland and Delaware customers. This method is frequently designated as a 60 or 90-day charge account. At no time within the past eight years has the Defendant ever recorded its conditional sales contracts in Maryland.

[fol. 27] (c) The Defendant has never repossessed by legal process any furniture or other merchandise for any customers in Maryland or elsewhere within the last fifteen years. The Defendant has on occasion accepted back merchandise which has not been satisfactory to the customer. In the event of delinquency in payments, the Defendant uses collection letters, which are sent through the mails. During the past ten years the Defendant has never instituted legal action through a Magistrate's or other Court in Maryland, nor has it in that period used a collection agent in Maryland. The Defendant employs no collectors. The Maryland customers make payments to the Defendant personally at the store in Wilmington, Delaware, or by check, cash or money order sent through the mails.

(d) No C. O. D. deliveries are made.

7. Except to the extent, if any, disclosed above, Defendant does not maintain, occupy or use, nor has it ever in the past maintained, occupied or used, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, any office, branch, place of distribution, sales or sample rooms or place, warehouse or storage place, or other place of business in the State of Maryland.

8. Except to the extent, if any, disclosed above, Defendant does not have, nor has it ever had, any representative, agent, salesman, canvasser or solicitor operating in the State of Maryland for the purpose of selling or taking any orders for tangible personal property, or delivering the same.

9. Defendant is not, nor has it ever been, qualified or registered to do business in the State of Maryland.

[fol. 28] 10. On or about March 10, 1952, the Comptroller of the State of Maryland assessed a deficiency in Use Tax against the Defendant in the amount of $356.40, $240.00 thereof representing the use tax claimed to be due, $32.40 thereof as interest claimed to be due and $84.00 thereof as a penalty claimed to be due for the tax period from July 1, 1947, through December 31, 1951, based upon all the sales referred to in paragraph 5 above.

11. Defendant has not applied for a permit nor been authorized by the Comptroller to collect any use tax under Section 312 of Article 81 of the Annotated Code of Maryland (1947 Supp.).

12. Defendant has not applied for, nor paid the license fee required to obtain, nor has been issued, a license pursuant to Sections 331-333 of Article 81 of the Annotated Code of Maryland (1947 Supp.).

13. Except as indicated above, Defendant does not engage and has not engaged in any activities in the State of Maryland.

James Piper, Wm. L. Marbury, Piper & Marbury, Attorneys for Defendant; Hall Hammond, Francis D. Murnaghan, Jr., Edward F. Engelbert, Attorneys for Plaintiff.

[fols. 29-30] IN THE SUPERIOR COURT OF BALTIMORE CITY

[Title omitted]

STIPULATION—Filed May 27, 1952

It is hereby stipulated that in the event that the Court should overrule the Defendant's petition to quash the writ of attachment, said petition shall be considered as having been refiled as a plea in bar by the Defendant appearing specially and solely for the purpose of defending its interest in the property attached, but nothing herein shall be taken as an admission on the part of the Plaintiff that the Defendant may appear specially for such a purpose.

If said petition is considered as having been refiled as a plea in bar, it is further stipulated that the request for relief in the answer of the Plaintiff to said petition shall be considered to have been amended, to read as follows:

> "Wherefore, Plaintiff prays that judgment be entered in personam against Defendant and that final judgment of condemnation be entered against the station wagon of Defendant attached in this proceeding, both judgments to be in the full amount of Plaintiff's claim in this case for use taxes, with interest and costs."
>
> (S.) James Piper, William L. Marbury, Piper & Marbury, Attorneys for Defendant, Hall Hammond, Francis D. Murnaghan, Jr., Edward F. Engelbert, Attorneys for Plaintiff.

[fol. 31] IN THE SUPERIOR COURT OF BALTIMORE CITY
STATE OF MARYLAND

vs.

MILLER BROTHERS COMPANY, a body corporate

OPINION—Filed August 11, 1952

This is an attachment proceeding by the State of Maryland to collect from Miller Brothers Company, a corpora-

tion, use taxes imposed by the Maryland Retail Sales and Use Tax Act, sections 259 to 336, inclusive, of Article 81 of the Annotated Code of Maryland (1947 Supp.), hereinafter referred to as the Act, in the amount of $356.40, which includes interest and penalty. The tax is an excise tax "levied and imposed on the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State for use, storage or consumption within this State." The tax is required to be paid by the purchaser. It is at the rate of two cents per dollar of the sale price. (§ 309). Section 311 requires the vendor to collect the tax from the purchaser, and by Section 315 the vendor is made personally liable to the State for the amount uncollected.

The proceeding was filed under Section 156 of Article 81 of the Code, which gives the State the right to resort to attachment, whether the defendant be a resident or nonresident of the State. A station wagon of the defendant was seized by the Sheriff and appraised in this proceeding at $800.

[fol. 32] Defendant filed a motion to quash the attachment on the ground that, if the Maryland Use Tax Law be construed to require the defendant to make the collections mentioned, the law is void because it violates (1) the due process clause of the Fourteenth Amendment of the Constitution of the United States, (2) Article 23 of the Declaration of Rights of the Constitution of Maryland, and (3) Section 8 (Commerce Clause) of Article 1 of the Constitution of the United States. The State contends that the grounds to quash relate to the merits of the claim and not to a defect in the papers or procedure or the right to maintain the attachment, if the claim is valid. The case was heard on an agreed statement of facts and it was also agreed that if the motion to quash is denied the reasons given therein shall be considered as a plea in bar to the short note case. As defendant desires the substantive questions determined, the motion to quash will be denied and the short note case determined.

The agreed facts, substantially as summarized by defendant, are as follows. The period involved is July 1, 1947 to December 31, 1951. The Company (defendant) is

a Delaware corporation. It has only one store, a retail household furniture store in Wilmington, Delaware. In addition to its Delaware customers, the Company has made, during said period, and does make certain sales of tangible personal property to residents of Maryland, who have used, consumed or stored such purchased personal property in Maryland. The customers appear at such store in Wilmington, Delaware, and select the items of furniture which they wish to purchase. Some of the items sold are the very items selected by the customers, and some are identical to those selected but are delivered from the Company's storeroom or warehouse in Wilmington, Delaware. Deliveries to Maryland purchasers are made in one of the following three ways and no other:

[fol. 33] (1) The article is taken away by the purchaser. During said period tangible personal property sold for at least $2500 was so delivered.

(2) The Company delivers the article in Wilmington, Delaware, to a common carrier which delivers the article in Maryland to the purchaser. The cost of delivery is borne solely by the Company. During said period tangible personal property sold for at least $1500 was so delivered.

(3) The article is delivered in Maryland to the purchaser, in a motor vehicle owned and operated by the Company, directly from the Company's store in Wilmington, Delaware, to the residence of the Maryland purchaser. The cost of delivery is borne solely by the Company. During said period tangible personal property sold for at least $8000 was so delivered.

Payment for some purchases is completed at the time the purchaser appears at the Company's retail store and prior to the delivery. Other sales are made on credit including some sales made to customers who reside in Maryland. In some such cases, including some sales to Maryland customers, the Company enters into conditional sales contracts and in others the terms of the credit transactions are simply noted on a sales slip, in which case the transaction is frequently designated as a sixty or ninety-day charge account.

The Company employs no solicitors or salesmen who operate in the State of Maryland. It has from time to

time mailed advertising matter to its customers whose names and addresses are on its records, including those who reside in Maryland, it has advertised regularly in newspapers published in Wilmington, Delaware, which have some circulation in some parts of Maryland, and it has broadcast programs containing radio or television advertising over stations located in Wilmington, Delaware, and these programs could have been received within the State [fol. 34] of Maryland. No special solicitation has ever been directed to Maryland residents. The Company has never qualified or registered to do business in the State of Maryland nor has it any assets physically located in this State. The station wagon attached in this particular case is used by the Company in making deliveries to its customers.

Most of the pertinent sections of the law are as follows:

> 311. Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this sub-title, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser.
>
> 308(k). 'Engaged in business in this State' means the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State. This term shall include, but shall not be limited to the following acts or methods of transacting business.
>
> (1) The maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, of any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.
>
> (2) The having of any representative, agent, salesman, canvasser, or solicitor operating in this

State for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

313. Every vendor required or permitted to collect the tax shall collect the tax imposed by the provision of this sub-title, notwithstanding the following:

(a) That the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the vendor at a point outside of this State as a result of solicitation by the vendor through the medium of a catalog or other written advertisement; or

(b) That the purchaser's order or contract of sale made or closed by acceptance or approval outside of this State or before said tangible personal property enters this State; or

[fol. 35] (c) That the purchaser's order or contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this State and shipped directly to the purchaser from the point of origin; or

(d) That said property is mailed to the purchaser in this State from a point outside this State or delivered to a carrier at a point outside this State, F.O.B., or otherwise, and directed to the vendor in this State, regardless of whether the cost of transportation is paid by the vendor or by the purchaser; or

(e) That said property is delivered directly to the purchaser at a point outside this State, if it is intended to be brought to this State for use, storage or consumption in this State.

324. The vendor or person subject to tax as provided in this sub-title shall be entitled to apply and credit against the amount of tax payable by him as stated in Section 323, an amount equal to three per cent (3%) of the gross tax to be remitted to the Comptroller to cover the expense in the collection and remittance of said tax; provided, however, that nothing contained in this section shall apply to any vendor or

person who shall fail or refuse to file his return with the Comptroller within the time prescribed by Sections 320 and 322 of this sub-title.

The defendant makes two principal contentions, (1) that as a matter of construction the Act is not applicable to it because it is not "engaging in business in this State" and (2) if the Act is construed to apply to it because it is "engaging in business in this State" then the Act is invalid because it violates the Federal and Maryland Constitutions in the respects above mentioned.

Before these questions are determined it is necessary to consider the contention of the State that the defenses set up by the defendant can not be considered in this proceeding because the defendant has not followed the procedure set forth in the Act to have its liability and the amount thereof reviewed by the Comptroller, and, if dissatisfied, by the appropriate court and eventually the Court of Appeals.

[fol. 36] The State relies on Sections 286, 287 and 288 of Article 81, which were enacted as part of the Act. Section 287 provides that "any taxpayer may apply to the Comptroller for revision of the tax assessed against him", who is then required to take such action as he deems just and notify the taxpayer of the action taken. The latter may within a specified time request a formal hearing before the Comptroller. After the hearing the Comptroller is required to make a determination and notify the taxpayer. Section 288 provides that the taxpayer, if dissatisfied with the determination of the Comptroller, may, within a time specified, appeal "to the Circuit Court for the County in which the taxpayer regularly conducts his business, or to the Baltimore City Court if the taxpayer regularly conducts his business in Baltimore City. Such appeal shall be limited to questions of law only * * *." If the taxpayer or the State is dissatisfied with the determination of the Court either may appeal to the Court of Appeals of Maryland.

Section 286 is as follows:

"No injunction or writ of mandamus or other legal or equitable process shall issue in any suit, action or

> proceeding in any court against this State or any officer or employee thereof to prevent or enjoin the collection under this sub-title of any tax sought to be collected, and no suit or proceeding shall be maintained in any court by any taxpayer for the recovery of any amount of taxes alleged to have been erroneously or illegally assessed or collected except as is provided by Sections 287-288, inclusive, of this subtitle."

With respect to the latter section defendant's position is that it has no relation to the present proceeding, because this is not a suit, action or proceeding against the State of Maryland or any officer or employee thereof, nor is any injunction or writ of mandamus or other legal or equitable process sought against the State or any officer or employee [fol. 37] thereof; and that this is not a suit or proceeding by a taxpayer for the recovery of taxes alleged to have been erroneously or illegally collected. That in this case defendant is seeking merely to defend its property.

Defendant also contends that Sections 287 and 288 are based on the assumption that defendant was engaged in the regular conduct of business in Baltimore City or in one of the counties and that such is not legally correct. Therefore, in order to invoke the right of appeal to the courts under Section 288, defendant would have been compelled to make a concession which would not only be contrary to fact but which would be highly prejudicial to its entire case, since it claimed the invalidity of the State's imposition of the tax on defendant arises out of the very fact that defendant is not conducting its business within Maryland. Therefore an application to the Comptroller would be sterile because defendant would have no means of court review as it does not regularly conduct its business in any of the subdivisions of the State.

Defendant refers to *Schneider* v. *Pullen*, 81 A.2d 226 (1951) in which the Court sustained the right of a person conducting a trade school to seek a declaratory decree as to the invalidity of a statute and regulations thereunder, requiring private trade schools to obtain certificates from the State Superintendent of Schools. The Court held

"that where a special form of remedy is provided, the litigant must adopt that form and must not bypass the administrative body or official by pursuing other remedies." But it was held "that where constitutional questions are involved, the litigant has the right to raise them", the Court "has the right to consider them", and "the legislature cannot interfere with the judicial process by de- [fol. 38] priving litigants from raising questions involving their fundamental rights in any appropriate judicial manner, nor can it deprive the courts of the right to decide such questions in an appropriate proceeding."

The State insists that the last mentioned case involved complete invalidity of the statute as to everyone and not its inapplicability to particular persons. After consideration of the arguments of the parties and the cases cited by them on this point, I conclude that defendant has the right to defend this suit by raising the constitutional questions above mentioned. Section 286 is not applicable; defendant is not taking the initiative but is merely defending its property. Sections 287 and 288 seem to relate to persons who, admitting they are subject to the Act, dispute the correctness of the proposed assessment. In any event said sections do not prevent a person resisting on constitutional grounds an asserted claim of liability against him.

The defenses to the claim will now be considered.

1. Defendant advances a construction of the Act which would avoid deciding the constitutional questions which it has raised. The contention is that its activities in the State and in connection with sales of merchandise and deliveries thereof to residents of the State do not constitute "engaging in business in this State" which is used in Section 311 and elsewhere in the Act. Reference is made to Section 308(k) which defines the meaning of "engaged in business in this State" as "the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State." The section also states that the term should include, *but shall not be limited to,* the following acts or [fol. 39] methods of transacting business. There are then set forth in two paragraphs certain "acts or methods of

transacting business." Defendant says it is not engaged in any of such acts or methods. It is specifically stated in the Act that the meaning of the term quoted is not limited to the particular acts or methods of transacting business. It is also argued that provisions in other sections of the Act imply the maintenance of a place of business within this State.

In *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. 335, it appears from the opinion of the Supreme Court of Iowa, 233 Iowa 877, that a "retailer maintaining a place of business in this state" was required to collect the use tax on the sale price of property which it sold to a purchaser in Iowa. The Court in deciding the question raised here said:

> "The contention is that defendant is not a 'retailer maintaining a place of business in this state,' as defined by paragraph 6 of said section 6943.102. The answer asserts facts from which it appears that, if the phrase were to be given its ordinary meaning, defendant is not such a retailer. But we are dealing with a statutory definition. The Tax Commission points out that the statute provides that a 'retailer maintaining a place of business in this state' shall include 'any retailer having * * * within this state * * * any agent operating within this state under the authority of the retailer * * * irrespective of whether such * * * agent is located here permanently or temporarily, or whether such retailer * * * is admitted to do business within this state.' The language is sufficient to include defendant within the terms of the statutory definition. We cannot shut our eyes to the words of the statute. The use of the words is the prerogative of the legislature. Our only function is to interpret the words which it has used. The trial court was right in holding that defendant's operations bring it within the letter and the language of the statute." (pp. 880-881)

The Supreme Court accepted the lower appellate court's finding (322 U. S. 335). In that case the vendor maintained no place of business and was not qualified or registered

to do business in that state. It sent traveling salesmen from Minnesota into Iowa, none of whom lived in Iowa or had [fol. 40] headquarters there. They solicited orders for merchandise in Iowa which orders were subject to acceptance or rejection at vendor's office in Minnesota. The salesmen were not authorized to make, and did not make, any contracts in Iowa. In filling such orders as were accepted merchandise was shipped from Minnesota into Iowa by delivery to common carriers, truck or rail, or by delivery to United States Postal Department; the purchasers paid all costs of transportation by carrier or parcel post.

I do not construe the phrase "engaged in business in this State" as meaning the same as doing business in the state in the sense of being suable there and subject to process on claims growing out of transactions in other states. The facts in the General Trading Company case and the case at bar are not importantly different. In that case the physical presence of employees or agents of the vendor in Iowa preceded the contract of purchase and consisted of solicitation. In the case at bar the solicitation was made by mail but the deliveries were made by defendant's agent or employee in its own truck or, at the expense of defendant, by common carrier. I, therefore, find that defendant is engaged in business in this state within the meaning of the Act.

2. It is contended by defendant that it is not doing business in Maryland in the sense that these words have always been understood by our Court of Appeals, and that there is grave doubt that the legislature could define the term in such a way as to include defendant without violation of Article 23 of the Declaration of Rights. The exact point as expressed by defendant does not have to be [fol. 41] resolved. In the first place there is nothing in the Act to indicate that the legislature in using the expression "engaged in business in this State" had reference to the much older expression "doing business in this State." The two phrases have different connotations, depending upon the context in which they are used and the subject matter. Doing business in the State so as to be subject to the local jurisdiction for the purpose of service of process and suit in the State (*M. J. Grove Lime Co.* v.

Wolfenden, 171 Md. 299), is essentially different from engaging in business for the purpose of collecting the use tax. Without further elaboration, I find no violation of Article 23 of the Maryland Declaration of Rights.

3. Sales taxes are not new. They have been the subject of judicial consideration, according to Mr. Justice Stone in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 51 (1940), for more than seventy years. Their asserted invalidity is almost always based on the Commerce Clause and the Fourteenth Amendment. In recent years the necessity of finding new sources of revenue has caused more states to resort to a sales tax law and its complement, use tax law, and, in connection with the latter, to endeavor to require out of state vendors to collect from purchasers the tax on merchandise which the vendor delivers in the state. Many of the latter situations have been submitted for judicial determination as to their validity under the Federal Constitution. In such tests of constitutionality the boundary line is narrow. A situation in a particular case, which was thought to be the reason for the result, has been brushed aside as irrelevant or unimportant in later cases. This judicial process has greatly clarified a complicated but important subject matter. No useful purpose would be served in analyzing and discussing all of the numerous cases cited by counsel. A reference to some of the more recent cases should be sufficient.

[fol. 42] The teaching of the cases is that considering the necessity of reconciling the competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed, it is only when state action amounts to an undue regulation or burden that it violates the Commerce Clause. The subject of state power in relation to the Commerce Clause is very fully elaborated by Mr. Justice Stone in the McGoldrick case and most of the sales and related tax cases are cited and discussed. Rather full excerpts from the opinion of some of the basic and fundamental matters at this point of the discussion may be helpful.

That case involved a sales tax enacted by New York City of 2% of each sale, imposed on the purchaser, and required

the seller to collect it for the City. "Sale" was defined as "any transfer of title or possession, or both * * * in any manner or by any means whatsoever for a consideration or any agreement thereof." Defendant, a Pennsylvania corporation, maintained a sales office in New York City. It mined coal in Pennsylvania and shipped by rail to dock in Jersey City and thence by barge to customers in New York City. All the sales contracts with the New York customers were entered into in New York City. In sustaining the validity of the law the Court said:

> "Section 8 of the Constitution declares that 'Congress shall have power * * * to regulate commerce with foreign Nations, and among the several States * * *' In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. See [fol. 43] *Gibbons* v. *Ogden*, 9 Wheat. 1, 187; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185. Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states."
>
> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock* v. *Bureau*, 303 U. S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of

the regulation of the commerce which the Constitution leaves to Congress."

After referring to a number of state taxes which had been upheld, the Court continued:

"In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.

* * * * * * *

It [New York tax] does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce, sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86; *Henneford* v. *Silas Mason Co., supra; Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167."

[fol. 44] In the colloquy between counsel and the Court at the hearing, counsel for defendant admitted that ultimately the constitutional defenses above mentioned depend upon a finding that the difference in the facts in the case at bar

and the facts in the *General Trading Company* case require a different legal conclusion. After careful study of the numerous Supreme Court decisions, I regard the difference between the two cases as unimportant with respect to the constitutional questions involved. It would seem from the "group" of sales and use tax cases that there must be some activity on the part of the ex-state vendor in the state in which the purchaser resides in order to give the latter state jurisdiction over said vendor. It would also appear that in considering the constitutional defenses mentioned there is a difference between a sales tax *as such* imposed on the ex-state vendor and a use tax imposed on the purchaser, with respect to which the ex-state vendor is required to be the tax collector for the state imposing the tax. Compare *General Trading Co.* v. *State Tax Commission of Iowa, supra*, and *McLeod* v. *Dilworth Co.*, 322 U. S. 327, in which, from an examination of the appellate court opinions of Iowa and Arkansas, 233 Iowa 877 and 205 Arkansas 780, and the Supreme Court opinions in these cases, the method of doing business and the activity of the ex-state vendors in the taxing states seem to be identical.

In General Trading Company case the solicitation in the state was by traveling salesmen from Minnesota. The orders that were obtained were subject to acceptance or rejection at the vendor's office in Minnesota. The orders which were accepted were shipped F.O.B. the Minnesota office. In the instant case the Maryland purchasers are solicited by advertising matter sent through the mail. Obviously orders must be accepted at the Wilmington office of the defendant. In General Trading Company delivery was made by postal authorities and common car- [fol. 45] rier at the expense of the purchaser. In the instant case some deliveries are similarly made, *i.e.*, common carrier, at the expense of defendant; most of the deliveries are made at the residence of the Maryland purchasers by the agent of defendant in its truck, which of course has to enter and use the facilities of Maryland to do so. There is, therefore, activity on the part of defendant in Maryland in the solicitation of orders and there is physical entrance into the state for the purpose of delivering the merchandise ordered. To require defendant to collect the use tax on such

merchandise as it delivers in the state, either by its own vehicle or by engaging a common carrier at its expense, does not in my opinion unduly regulate or burden or discriminate against interstate commerce so as to make the Act invalid under the Commerce Clause.

In 1941 the cases of *Nelson* v. *Sears Roebuck & Co.* and *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 359 and 373, were decided. The facts were substantially the same in the two cases. Each mail order house maintained stores and conducted business in Iowa. They disputed the constitutional right of Iowa to require it to collect a use tax with respect to merchandise ordered directly by residents of Iowa from out of state branches of the vendors, which orders were filled by direct shipments by mail or common carrier from the branches to the purchaser, it being admitted that such orders were not solicited or placed by any of the vendor's agents in Iowa. In sustaining the obligation of the vendors to collect the use tax for Iowa on such mail order business, the Court said:

> [fol. 46] "Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out of state mail order houses which need not and do not collect the tax on their Iowa sales. But those other concerns are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price. Respondent further stresses the cost to it of making these collections and its probable loss as a result of its inability to collect the tax on all sales. But cost and inconvenience inhered in the same duty imposed on the foreign corporations in the *Monamotor* and *Felt & Tarrant* cases. And so far as assumed losses on tax collections are concerned, respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents, or

to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid.

"Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem." (pp. 365-366)

After the Nelson cases the effort was made to distinguishing other use tax cases because of the difference in the method of conducting the business. These efforts were brushed aside by Mr. Justice Frankfurter, speaking for the majority in the General Trading Company case, supra, pp. 337-339, as follows:

"We brought the case here, 320 U. S. 731, to meet the claim that there was need for further precision regarding the scope of our previous rulings on the power of States to levy use taxes. In view, however, of the clear understanding by the court below that the facts we have summarized bring the transaction within the taxing power of Iowa, there is little need for elaboration. We agree with the Iowa Supreme Court that *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co., supra;* and *Nelson* v. *Montgomery Ward & Co., supra*, are controlling. The *Gallagher* case is indistinguishable—certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine for shipment from without a State as in the *Gallagher* case, compared with the comparatively simpler needs for soliciting business in this case. [fol. 47] And the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the State. All these differentiations are without constitutional significance.

Of course, no State can tax the privilege of doing interstate business. See *Western Live Stock* v. *Bureau*, 303 U. S. 250. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See *Best & Co.* v. *Maxwell*, 311 U. S. 454.

"None of these infirmities affects the tax in this case any more than it did in the other cases with which it forms a group. The tax is what it professes to be—a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device. *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93-94; *Felt & Tarrant Co.* v. *Gallagher, supra.*

The power of a state to require the ex-state distributor to collect the use tax as its agent was also sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, referred to therein as "a common and lawful arrangement"; *Felt & Tarrant* v. *Gallagher*, 306 U. S. 62; *McGoldrick* v. *Berwind-White, supra.*

Defendant denies the jurisdiction of Maryland over it on the ground that it must be found that defendant is engaged in business in Maryland, and a prerequisite to such finding is that its solicitation or deliveries in Maryland must be regular, continuous and persistent, which terms are used in *Nippert* v. *City of Richmond*, 327 U. S. 416, involving a municipal ordinance imposing a license tax on solicitors, which was held to violate the Commerce Clause.

[fol. 48] Whether either solicitation or deliveries are regular, continuous or persistent is necessarily relative, depending upon the particular business. No point to that effect was made in *General Trading Company*, and in the instant case the agreed facts do not show that there was not such an activity by defendant. According to the agreed facts, solicitation by mail occurred four times a year, while there are no details with respect to deliveries except the admitted fact that the deliveries by common carrier of merchandise sold for $1500 and by the company's own vehicle of merchandise sold for $8000 constitutes almost 80% of all tangible personal property sold during the period in question to residents of Maryland. I cannot find from the agreed facts, considering the nature of defendant's business, that its solicitations and deliveries in Maryland were not regular and continuous as opposed to casual and spasmodic. Indeed it is implied in *Nippert* v. *Richmond*, *supra*, page 426, that the making of delivery, if it consists of a course of business, may constitute "doing business" in the state.

4. I, therefore, conclude that the State has jurisdiction to require defendant to collect for it the use tax on tangible personal property which it delivers in Maryland by its own truck or by common carrier. I also conclude that the State has no jurisdiction over defendant with respect to such property purchased by Maryland residents at Wilmington and personally brought by such residents into Maryland. This question was mentioned but not decided in a foot note in *Nelson* v. *Montgomery Ward & Co.*, *supra*, page 374. The exact question was whether Montgomery Ward & Co., which qualified and was doing business in Iowa, could be required to collect the tax on sales made by its other stores lo-[fol. 49] cated in other states near the Iowa border. In the dissenting opinion of one judge of the Supreme Court of Iowa, 228 Iowa 1303, who took the same view as the Supreme Court of the United States as to the mail order sales, it was said that the imposition on the vendor of such "an almost impossible task" would be "a burden so unreasonable, arbitrary and capricious as to invade its constitutional rights under the due process clause of the Federal Constitution" and would, therefore, be invalid. I think

the Maryland Act cannot reach such transactions because Maryland can not project its jurisdiction into another state, even though the latter is so near the Maryland border that some residents of the latter may circumvent the Use Tax Act.

The latter conclusion does not, however, affect the right of the State to recover the assessment against defendant on such sales which, according to the stipulation, amount to $2500 during the period in question. As the defendant has been found to be "engaged in business" within the meaning of the Act, the Comptroller had the legal right to make the deficiency assessment against it, and impose the interest and penalties that are included in the amount involved in the short note case. In the light of the conclusion defendant could have proceeded under the above mentioned Sections 287 and 288 of Article 81 to have this particular assessment revised. It, therefore, should have pursued the administrative remedies with respect to said item. Defendant elected to stand on what it considered its constitutional rights and defend against the effort to collect *any* of the claim from it. I think it had the right to do so, but, after it is found to be subject to the Act, it is too late to have the *amount* of its liability revised and [fol. 50] redetermined. However, as this is in the nature of a test case, its future conduct can be governed accordingly.

A formal order may be presented for the entry of judgment in the short note case for the plaintiff for the amount of its claim with interest and costs.

S. Ralph Warnken.

[fols. 51-54] In the Superior Court of Baltimore City

[Title omitted]

Order—Filed August 19, 1952

Ordered, this 19th day of August, 1952, by the Superior Court of Baltimore City, that judgment be entered for the Plaintiff in the amount of Three hundred and sixty-three dollars, with interest from date and costs in this action.

S. Ralph Warnken.

Approved as to form:

Piper & Marbury, By: James Piper, Attorneys for Defendant; (S.) Hall Hammond, Attorney General, Francis D. Murnaghan, Jr., Assistant Attorney General, Attorneys for Plaintiff.

[fol. 55] In the Superior Court of Baltimore City

[Title omitted]

Order—Filed September 17, 1952

Upon the foregoing Petition and Consent, it is ordered this 17th day of September, 1952, by the Superior Court of Baltimore City that the petition to quash and set aside the writ of attachment be and the same is hereby denied *nunc pro tunc* as of August 19, 1952, and that the Clerk of said Court be and he is hereby ordered to correct, *nunc pro tunc*, his records, to show the effective date of said order to be August 19, 1952, so that the entry will read:

"19 August 1952. Order of Court denying Defendant's petition to quash and set aside writ of attachment. Order of Court filed."

S. Ralph Warnken.

[fol. 56] In the Superior Court of Baltimore City

[Title omitted]

Order of Appeal—Filed September 17, 1952

Mr. Clerk:

Enter an Appeal to the Court of Appeals of Maryland on behalf of the Defendant, Miller Brothers Company, from the judgment dated August 19, 1952, for the Plaintiff in the above short note case of State of Maryland v. Miller Brothers Company.

James Piper, William L. Marbury, Piper & Marbury, Attorneys for Defendant, 1000 Maryland Trust Building, Calvert and Redwood Streets, Baltimore 2, Maryland.

Certificate of service (omitted in printing).

[fol. 57] In the Superior Court of Baltimore City

[Title omitted]

Order of Appeal—Filed September 18, 1952

Mr. Clerk:

Enter an Appeal to the Court of Appeals of Maryland on behalf of the Defendant, Miller Brothers Company, from the Order of the Court dated September 17, 1952, denying *nunc pro tunc*, as of August 19, 1952, Defendant's petition to quash and set aside the writ of attachment in this attachment case.

James Piper, William L. Marbury, Piper & Marbury, Attorneys for Defendant, 1000 Maryland Trust Building, Calvert and Redwood Streets, Baltimore 2, Maryland.

Certificate of service (omitted in printing).

[fols. 58-59] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 60] In the Court of Appeals of Maryland, October Term, 1952

No. 93

Miller Brothers Company

v.

State of Maryland

Judge Delaplaine Delivered the Opinion of the Court—Filed March 11, 1953

These two appeals test the constitutionality of the Maryland Use Tax Act, Code 1951, art. 81, secs. 368-396, as applied to furniture sold by appellant, Miller Brothers

Company, a Delaware corporation, at its store in Delaware and delivered to purchasers residing in Maryland.

The tax is an excise imposed by the Legislature on "the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State * * * for use, storage or consumption within this State." The Act expressly provides in Sec. 369 that the tax shall be paid by the purchaser and shall be computed as follows: (a) on each sale where the price is from 51 cents to $1, both inclusive, 2 cents; (b) on each 50 cents of price or fraction thereof in excess of $1, 1 cent. The tax is paid by the purchaser to the vendor, as trustee for the State, and the vendor is liable for the collection for the State.

The State entered suit against appellant on March 19, 1952, to recover $356.40 assessed by the State Comptroller as deficiency in use tax in the period from July 1, 1947, to December 31, 1951. The State also filed a non-resident attachment suit against appellant and attached a station wagon owned by it. Appellant, appearing specially, [fol. 61] filed a petition to quash the writ of attachment on the ground that the assessment was unconstitutional. The State answered that appellant had neither applied for a revision of the assessment nor paid the tax and applied for a refund, and prayed that the petition to quash be dismissed because (1) the collection of use taxes may be contested only by the proceeding set forth in the statute, and (2) the assessment was authorized by statute and was constitutional.

In the short note case the Court entered judgment in favor of the State for $363, and in the attachment case it passed an order denying the petition to quash. We have been asked to review both the judgment and the order.

At the outset the State made the objection that if appellant desired to contest the assessment, it should have applied to the State Comptroller for a revision of the assessment; and that, having failed to do so, it was precluded from contesting it in the attachment case. It is entirely true that the courts do not favor the by-passing of administrative agencies, except where there is a clear necessity for a prior judicial decision. We have accordingly held that

where a special form of remedy is provided by statute, the litigant should resort to that form rather than pursue other remedies, although where a constitutional issue is raised, and there is no danger of by-passing administrative action, the question may properly be decided in a suit for injunction or declaratory decree before the time has arrived for invoking the statutory remedy. Kahl v. Consolidated Gas, Electric Light & Power Co., 191 Md. 249, 258, 60 A. 2d 754; Commissioners of Cambridge v. Eastern Shore Public Service Co., 192 Md. 333, 64 A. 2d 151; Francis v. MacGill, Md., 75 A. 2d 91; Kracke v. Weinberg, Md., 79 A. 2d 387; Schneider v. Pullen, Md., 81 A. 2d 226; Reiling v. State Comptroller, Md., 94 A. 2d 261.

The Retail Sales Tax Act and the Use Tax Act provide that any taxpayer may apply to the Comptroller for revision of the tax assessed against him, and the Comptroller shall [fol. 62] act promptly upon the application and notify the taxpayer of his action. Any taxpayer dissatisfied with the final determination of the Comptroller may appeal therefrom to the Circuit Court for the County in which the taxpayer regularly conducts his business or to the Baltimore City Court if the taxpayer regularly conducts his business in Baltimore City. The taxpayer, or the Attorney General on behalf of the State, or the Comptroller may, within 30 days from the final order entered by the Court, appeal to the Court of Appeals of Maryland. Code 1951, art. 81, secs. 347, 348, 394.

Appellant is a foreign corporation. It has never qualified or registered to do business in Maryland and has no resident agent in this State. It is engaged in the retail household furniture business. It has only one store, which is located in Wilmington. It does not maintain any office, branch store, warehouse or other place of business in Maryland. It has no salesman or other employee in Maryland. It does not maintain a mail-order business or accept orders by telephone, as most of the merchandise sold by it requires personal inspection and selection. It has, however, mailed from time to time advertising matter to its customers, including those who reside in Maryland. If merchandise purchased by a resident of Maryland is not taken away by the purchaser, the seller delivers it by its own

motor vehicle or by common carrier. As appellant has not been regularly conducting its business in any County of the State or in Baltimore City, within the meaning of Section 348, it could not have followed the statutory procedure. Therefore, appellant was not precluded from challenging the validity of the assessment in the attachment case.

Appellant urged that it was not the intention of the Legislature to put the burden of collecting use taxes upon a foreign corporation which does not engage in any activity in Maryland except delivery of merchandise. It is true that even the solicitation of business in Maryland by an agent of a foreign corporation, without other substantial activities within the State, does not constitute "doing business" in the State within the meaning of the For- [fol. 63] eign Corporation Law so as to subject itself to the State forum. Code 1951, art. 23, sec. 88; M. J. Grove Lime Co. v. Wolfenden, 171 Md. 299, 303, 188 A. 794; Shaughnessy v. Linguistic Society of America, Md., 84 A. 2d 68, 71. But here we are dealing with a statute which is far broader in its application.

Section 371 of the Act provides: "Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this subtitle, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser."

Section 368(k) defines the term "engaged in business in this State" as the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State.

In view of this unusually broad definition of "engaged in business," we must hold that the statute is applicable to appellant, because it delivered merchandise to purchasers in Maryland.

We now consider the basic question whether the Maryland use tax infringes Article I, Section 8 of the Constitution of the United States, which vests in Congress the

power to regulate commerce with foreign nations and among the several States. This provision of the Constitution was designed by the framers to eliminate the barriers which had been erected by the States to the freedom of movement across State borders. While the Constitution grants to Congress the power to regulate commerce among the States, it does not say what the States can do or cannot do in the absence of Congressional action. It may be generally stated, however, that while the Commerce Clause forbids a State to impose taxes directly on interstate commerce, it does not absolutely prevent the [fol. 64] imposition of State taxes which, under certain circumstances, may have some incidental effect upon such commerce. The State cannot use its taxing or police power with the aim and effect of establishing an economic barrier against competition with the products of another State. The importer must be free from taxes which are imposed for the purpose of suppressing competition from outside the State and which lead to the suppression intended. It has been said that no formula can be devised for determining in all cases whether or not a State tax is prohibited by the Commerce Clause, and that the question is inherently a practical one depending for its decision on the facts of each particular case. J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 924, 82 L. Ed. 1365, 117 A. L. R. 429.

Taxes on sales of personal property have been upheld by the United States Supreme Court in decisions extending back to 1869, when the Court, speaking through Justice Miller in Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382, held that an ordinance of the City of Mobile, Alabama, authorizing the collection of a tax on sales at auction was valid as applied to goods which were products of other States. Since that time the Court has uniformly sustained a tax imposed by the State of the buyer upon a sale of goods effected by delivery to the purchaser upon arrival at destination after an interstate journey. In referring to that ruling, Justice Stone said in McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 394, 395, 84 L. Ed. 565: "It ha the support of reason and of a due regard for the just balance between national and state

power. In sustaining these taxes on sales emphasis was placed on the circumstances that they were not so laid, measured or conditioned as to afford a means of obstruction to the commerce or of discrimination against it, and that the extension of the immunity of the commerce clause contended for would be at the expense of state taxing power by withholding from taxation property and transactions within the State without the gain of any needed protection to interstate commerce."

[fol. 65] In Henneford v. Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814, the Court held that in its application to machinery, materials and supplies purchased at retail in other States by contractors and brought into the State of Washington for use in construction, a State tax of 2 per cent of the purchase price, including the cost of transportation, for the privilege of using any article of tangible personal property within the State was not a tax on the operations of interstate commerce, but a tax on the privilege of use after such commerce was at an end, and therefore did not unlawfully burden interstate commerce. The Court explained that the right to use property is only one of the privileges making up ownership, and the fact that the tax laid upon the use of personal property purchased at retail, either within or without the State, was called an excise did not make the State's power to impose it less under the Commerce Clause than if it had been called a property tax.

In Pacific Telephone & Telegraph Co. v. Gallagher, 306 U. S. 182, 59 S. Ct. 396, 83 L. Ed. 595, the Court held that a California use tax, imposing an excise on the consumer for the use, storage or consumption in California of tangible personal property purchased from any retailer, did not infringe the Commerce Clause in its application to equipment, materials and supplies purchased outside California by a California corporation operating a telephone and telegraph system in interstate and intrastate commerce and shipped to it in interstate commerce at various points within the State.

In Nelson v. Sears, Roebuck & Co., 312 U. S. 359, 61 S. Ct. 586, 85 L. Ed. 888, the Court held that where a New York corporation was doing business in Iowa through its

retail stores, the fact that a sale by one of its mail-order houses located outside Iowa to a customer within the State was made outside the State did not preclude application of the use tax thereto on the ground that the purchaser employed agencies of interstate commerce to effectuate the purchase.

[fol. 66] In Nelson v. Montgomery Ward & Co., 312 U. S. 373, 61 S. Ct. 593, 85 L. Ed. 897, the Court held that the Iowa Use Tax Act was not unconstitutional as applied to mail-order sales solicited by an Illinois corporation through advertising by its stores in Iowa, although the orders were sent to out-of-State mail-order houses and were filled by shipments to customers in Iowa, since the corporation could not thus escape the tax exacted by Iowa as a price of enjoying benefits flowing from its Iowa business.

In line with these decisions, we hold that the Maryland Use Tax Act, as applied to appellant's sales of furniture delivered to purchasers residing in Maryland does not unlawfully interfere with interstate commerce. Of course, we recognize that the Commerce Clause prevents the State not only from enacting legislation that constitutes a direct burden on interstate commerce, but also from imposing any heavier burden on products brought into the State from other States than it imposes upon similar products of their own territory. It is well established that a State tax on merchandise brought into the State from another State or upon its sales after it has reached its destination is lawful only when the tax is not discriminatory in its incidence against the merchandise because of its origin in another State. Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 643, 646, 67 L. Ed. 1095; Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497, 502, 79 L. Ed. 1032, 101 A. L. R. 55. However, a use tax statute, as applied to property purchased outside the State and brought into the State by the seller and used therein by the purchaser in conducting its business, is not discriminatory and hence does not offend the Commerce Clause where the tax is not exacted upon any article the sale or use of which has been subjected to a tax equal to or in excess of the challenged tax, whether under the laws of the State imposing the challenged tax or those of any other State.

Appellant has failed to show that the Maryland use tax is discriminatory. This tax is complementary to the retail sales tax. Code 1951, art. 81, secs. 320-367. Section 370 of [fol. 67] the Use Tax Act specifically exempts from the use tax all personal property upon which a retail sales tax has been paid to the State of Maryland. It is one of the functions of the integrated sales and use taxes to remove the temptation of buyers to place their orders in other States in the effort to escape payment of the tax on local sales. The fact that the buyer employs agencies of interstate commerce to effectuate his purchase is not material, since the tax is imposed on the privilege of use, storage or consumption of property after the commerce is ended. The statute taxes the use, storage or consumption of the property in the State of Maryland, regardless of the time when the tax is required to be paid.

The final contention is that the assessment violates the Due Process Clause of the Fourteenth Amendment of the Federal Constitution and also Article 23 of the Maryland Declaration of Rights, which declares that no man ought to be "deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land." Appellant, appearing specially in the attachment case for the purpose of quashing the writ of attachment, sought to defend its interest in the attached motor vehicle without subjecting itself to the jurisdiction of the Superior Court.

Attachment proceedings, except those used as execution on judgment, are designed to accomplish two purposes: (1) to compel the appearance of the defendant to answer the plaintiff's demand, and (2) to give the plaintiff a security for the payment of his claim. This security is obtained at the commencement of the action by the seizure of the defendant's property. When the property is validly acquired, it is retained to await the result of the action, unless the defendant appears to the suit in the meantime and displaces the lien acquired under the attachment by substituting the security of a bond. If the defendant in a nonresident attachment suit appears, the proper course is to try the short note case against him before trying the attachment case. After the defendant has appeared and a verdict has been rendered in favor of the plaintiff in the

short note case, the entry of a judgment *in personam* will [fol. 68] not be arrested on account of the existence of any ground for quashing the attachment. Philbin v. Thurn, 103 Md. 342, 63 A. 571.

Nevertheless, it is permissible for a defendant whose property has been attached to appear in the action solely for the purpose of protecting his property and without subjecting himself personally to the jurisdiction of the court, even though in order to protect his property he contests the validity of the plaintiff's claim. In such a case the court has jurisdiction over the property attached, but does not have jurisdiction over the person of the defendant. In support of this rule, the American Law Institute states: "If the court thereby acquires jurisdiction over him personally, in spite of his protestation that he does not intend to submit himself personally to the jurisdiction of the court, he has been placed in a difficult dilemma. He has been compelled either to lose his property, even though the claim against him is unfounded, or to submit himself personally to the jurisdiction of the court which otherwise could have no power over him." Restatement, Judgments, sec. 40.

But even acknowledging that appellant, a foreign corporation, was not subject to the State's jurisdiction, we hold that appellant may be held liable for the collection of the use tax from its Maryland customers. Appellant relied on two Mississippi decisions, Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22, and Stone v. Reichman-Crosby Co., 43 So. 2d 184, holding that a nonresident seller engaged in interstate commerce is not subject to the State's jurisdiction and taxing power so as to be personally liable for failure to collect and pay a tax levied against citizens of Mississippi. We follow the decisions of the United States Supreme Court, rather than the Mississippi decisions.

In Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488, the Court held that the California Use Tax Act requiring retailers to collect the use tax from purchasers did not violate the Due Process Clause of the Fourteenth Amendment as applied to appellant, an Illinois corporation, which did not carry on any intra- [fol. 69] state operations in California and was not sub-

ject to its jurisdiction, as against the argument that California lacked the power to require it to act as the State's collecting agent for the use tax and to insure payment of the tax if it failed to make collections from the tax debtors. Again in Southern Pacific Co. v. Gallagher, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586, the Court held that the California use tax, as applied to tangible personal property purchased outside the State by the railroad company and installed on importation or kept available for use as part of the transportation facilities, was not invalid as violating the Due Process Clause, since the taxable event was the exercise of property rights in California.

In General Trading Co. v. State Tax Commission of Iowa, 322 U. S. 335, 64 S. Ct. 1028, 1029, 1030, 88 L. Ed. 1309, where a Minnesota seller had no office, branch, warehouse, or general agent in Iowa, but shipped goods from Minnesota to purchasers in Iowa, Justice Jackson, dissenting, said: "So we are holding that a state has power to make a tax collector of one whom it has no power to tax. Certainly no state has a constitutional warrant for making a tax collector of one as the price of the privilege of doing interstate commerce. * * * The power of Iowa to enforce collection in other states is certainly very limited and the effort to do so on any wide scale is unlikely either to be systematically pursued or successfully executed."

While it may be true that the tax can be easily evaded, nevertheless the Court, speaking through Justice Frankfurter, said: "The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device."

As we find no valid objection to the assessment, we affirm the judgment entered in the short note case in favor of the State and also the order in the attachment case denying appellant's petition to quash the attachment.

Judgment affirmed, with costs.

Order affirmed, with costs.

[fol. 70] In Court of Appeals of Maryland, October Term, 1952

No. 93

Mandate—March 11, 1953

Miller Brothers Company

vs.

State of Maryland

2 appeals in one record from the Superior Court of Baltimore City.

Filed: Oct. 27, 1952.

March 11, 1953, Judgment affirmed, with costs.
Order affirmed, with costs.
Opinion filed.
Op. Delaplaine, J.

[fol. 71] In the Court of Appeals of Maryland

[Title omitted]

Petition for Appeal—June 4, 1953

To The Honorable, Simon E. Sobeloff, Chief Judge of the Court of Appeals of the State of Maryland:

The petition of Miller Brothers Company, appellant, in this Court and defendant in the Superior Court of Baltimore City, respectfully shows:

Considering itself aggrieved by the final order and judgment of this Court entered on March 11, 1953, for the reasons set forth in the accompanying Assignment of Errors, petitioner prays that an appeal be allowed to the Supreme Court of the United States from said final order and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said appellant and that the amount of security for costs

be fixed by the order allowing the appeal; and that a transcript of the material parts of the record, proceedings and papers upon which said final order and judgment were based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, James Piper, William L. Marbury, William Poole, James L. Latchum, Counsel for Appellant.

Dated: June 4, 1953.

[fol. 72] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ORDER ALLOWING APPEAL—June 4, 1953

Miller Brothers Company having made and filed its petition praying for an appeal to the United States Supreme Court from the final order and judgment of this Court in this cause entered on March 11, 1953, and from each and every part thereof, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is this 4th day of June, 1953, hereby

Ordered that said appeal be and the same is hereby allowed as prayed for; and

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $250.00 with good and sufficient surety and shall be conditioned as may be required by law;

It is further ordered that citation shall issue in accordance with law; and

[fol. 73] It is further ordered that the Clerk of the Court of Appeals of Maryland prepare, certify and transmit to the Supreme Court of the United States the transcript of record.

Simon E. Sobeloff, Chief Judge.

[fol. 74] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—June 4, 1953

Miller Brothers Company, a body corporate, appellant in the above entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which it will rely in its prosecution of said appeal from the final judgment of the Court of Appeals of Maryland entered on March 11, 1953.

(1) The Court of Appeals of Maryland erred in upholding the validity of the Maryland Use Tax Act (Chapter 681 of the Acts of 1947, as amended; codified as Sections 368-396, inclusive, of Article 81 of the Annotated Code of Maryland, 1951 Edition) which makes appellant liable for use tax on goods sold in Delaware to residents of Maryland and subsequently taken by such residents into Maryland for use there, since the exaction of such a tax is repugnant to the Commerce Clause of the Federal Constitution.

(2) The Court of Appeals of Maryland erred in upholding the validity of the Maryland Use Tax Act which makes appellant liable for a use tax on goods sold by appellant in Delaware to residents of Maryland and subsequently delivered to such residents by common carrier because the exaction of such a tax is repugnant to the Commerce Clause of the Federal Constitution.

(3) The Court of Appeals of Maryland erred in upholding the validity of the Maryland Use Tax Act which makes [fol. 75] appellant liable for a use tax on goods sold by appellant in Delaware to residents of Maryland and subsequently delivered to such residents in motor vehicles owned and operated by appellant, since the exaction of such a tax is repugnant to the Commerce Clause of the Federal Constitution.

(4) The Court of Appeals of Maryland erred in upholding the validity of the Maryland Use Tax Act which makes appellant liable for use tax on goods sold in Delaware to

residents of Maryland and subsequently taken by such residents into Maryland for use there, since the exaction of such a tax is repugnant to the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

(5) The Court of Appeals of Maryland erred in upholding the validity of the Maryland Use Tax Act which makes appellant liable for a use tax on goods sold by appellant in Delaware to residents of Maryland and subsequently delivered to such residents by common carrier because the exaction of such a tax is repugnant to the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

(6) The Court of Appeals of Maryland erred in upholding the validity of the Maryland Use Tax Act which makes appellant liable for a use tax on goods sold by appellant in Delaware to residents of Maryland and subsequently delivered to such residents in motor vehicles owned and operated by appellant, since the exaction of such a tax is repugnant to the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

Wherefore, the appellant, Miller Brothers Company, prays that the said final judgment of the Court of Appeals of Maryland be reversed and the said court be directed to [fol. 76] enter judgment in favor of the appellant; and prays for such other relief as the Court may deem fit and proper.

James Piper, William L. Marbury, William Poole, James L. Latchum, Counsel for Appellant.

Dated: June 4, 1953.

[fol. 77] Citation in usual form showing service on Francis D. Murnaghan, Jr., omitted in printing.

[fols.78-80] Statement Required by Paragraph 2 of Rule 12 of the Rules of the Supreme Court (omitted in printing).

[fols. 81-86] Cost Bond on Appeal for $250.00 approved June 8, 1953 omitted in printing.

[fol. 87] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 88] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 160

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON—Filed July 10, 1953

Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors and Prayer for Reversal heretofore filed.

James Piper, William L. Marbury, William Poole, James L. Latchum, Counsel for Appellant.

Dated: July 9, 1953.

[fol. 89] Proof of Service (omitted in printing).

[fols. 90-91] [File endorsement omitted]

[fol. 92] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. 160

[Title omitted]

STIPULATION AS TO PRINTING—Filed July 14, 1953

The parties to the above-entitled cause hereby stipulate that the following parts of the record should be printed by the Clerk of the Supreme Court:

No.		Record Pages
16.	Opinion of Court of Appeals dated March 11, 1953	120-129
17.	Petition for Appeal to Supreme Court	60
18.	Order Allowing Appeal to Supreme Court	61- 62
19.	Assignment of Errors and Prayer for Reversal	63- 65
20.	This Stipulation as to Printing	

James Piper, William L. Marbury, William Poole, James L. Latchum, Counsel for Appellant; [fol. 94] Edward D. E. Rollins, Attorney General, J. Edgar Harvey, Deputy Attorney General, Francis D. Murnaghan, Jr., Assistant Attorney General, Counsel for Appellee.

Dated: July 14, 1953.

[fols. 95-96] [File endorsement omitted]

[fol. 97] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 160

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 12, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the summary docket and assigned for oral argument immediately following No. 128, County Board of Arlington County, Virginia, et al. vs. State Milk Commission.

The Chief Justice took no part in the consideration or decision of this question.

[redacted]

[redacted]

Appellant

v.

STATE OF MARYLAND

[redacted]

Appellee

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Counsel for Appellant

INDEX

Subject Index

Table of Cases Cited

STATUTES AND OTHER AUTHORITIES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, as amended, appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment and order of the Court of Appeals of Maryland entered in this case.

Opinion Below

The opinion of the Court of Appeals of Maryland has not been officially reported. It may be found in 95 A. 2d 286. The opinion of the Superior Court of Baltimore City has not been reported. Copies of both opinions are attached hereto as Appendix A.

Jurisdiction

The judgment and order of the Court of Appeals of Maryland were entered on March 11, 1953. (R. 129) A peti-

tion for appeal is being presented to the Chief Judge of that court, to wit, on June 4, 1953. The jurisdiction of the Supreme Court to review the judgment and order on appeal is conferred by Title 28, United States Code, Section 1257 (2), 62 Stat. 929.

On March 19, 1952, the State of Maryland (appellee here and in the Court of Appeals of Maryland) filed an attachment proceeding in the Superior Court of Baltimore City alleging that appellant was indebted to it by reason of its "failure and refusal to pay legally assessed deficiencies to the said State of Maryland, in Use Taxes justly due and owing, in the full and just sum of Three Hundred Fifty-six dollars and Forty cents ($356.40)". (R. 9) The court thereupon issued a writ of attachment directing the Sheriff of Baltimore City to attach any property of appellant which could be found in the jurisdiction. (R. 14-15) The Sheriff's return on this writ shows that on April 4, 1952, he seized a station wagon bearing Delaware License No. C 4749 which he appraised at a value of $800. (R. 15-16)

On March 19, 1952, the same day the attachment proceeding was filed, and in connection with the attachment proceeding, the State of Maryland filed a suit (called in Maryland parlance "the short note case") against appellant in the Superior Court of Baltimore City, Maryland, to recover taxes, interest and penalty alleged to be due in the amount of $356.40. (R. 10-11) The Sheriff of Baltimore City was directed to summon the appellant to appear on a day named in the writ of summons. (R. 13) The Sheriff's return on the writ of summons shows that the appellant was not found within the jurisdiction of that court. (R. 13)

Thereafter appellant appeared specially in the attachment proceeding solely for the purpose of protecting its interest in the property attached and petitioned the court to quash the writ of attachment for the following reasons:

"(a) The use tax which the Plaintiff claims is due and owing by the Defendant to the Plaintiff consists of use taxes which Plaintiff claims the Defendant was required, by the Maryland Use Tax Law [Sections 308 to 337[1] inclusive of Article 81 of the Annotated Code of Maryland, 1947 Cumulative Supplement (as amended)] to collect and pay to the Plaintiff on sales of certain tangible personal property made by the Defendant in the State of Delaware to Maryland purchasers. The Defendant has not engaged nor does it engage in any local activities in the State of Maryland which could be the basis for such a requirement. If the Maryland Use Tax Law be construed to require the Defendant to make said collections and payments, said Law is void because it violates (i) the due process clause of the Fourteenth Amendment to the Constitution of the United States of America, (ii) Article 23 of the Declaration of Rights of the Constitution of Maryland, and (iii) Section 8 (Commerce Clause) of Article I of the Constitution of the United States of America.

"(b) That the Maryland Use Tax Law cannot properly be construed to require the Defendant to make said collections and payments."

The State of Maryland then moved to dismiss appellant's petition on the grounds (1) that collection of sales and use taxes could be contested only by following certain administrative and court proceedings prescribed by the sales and use tax laws, and (2) that the assessment, collection and payment of the tax involved were authorized and required by Sections 368 through 396, inclusive, of Article 81 of the Annotated Code of Maryland and such authorization and requirement did not violate any provisions of the Consti-

---

[1] NOTE: These sections were renumbered as section 368-396, inclusive, in the 1951 Edition of the Annotated Code of Maryland, which was published after the trial of this case in the Superior Court of Baltimore City but before the case was heard on appeal in the Court of Appeals of Maryland. Except as specifically noted, the numbering of the 1951 Edition will be used throughout this Statement.

tution of the United States of America or the Constitution of the State of Maryland. (R. 21-22)

Pursuant to a stipulation (R. 29) signed by counsel for both appellant and the State of Maryland, appellant's petition was considered as having been refiled as a plea in bar in the short note case by appellant appearing specially and solely for the purpose of defending its interest in the property attached (R. 29), and the case then proceeded to hearing on the issues raised by the State's request for dismissal of the petition to quash the writ of attachment and by its request for judgment against the appellant in the short note case and for a final judgment of condemnation against the station wagon attached, and by the appellant's petition to quash the writ of attachment and its plea in bar which made the same contentions as the petition. These contentions are summarized above and will not be restated.

An agreed statement of facts was presented to the court from which it appeared that the taxes which the State was seeking to collect from appellant arose out of sales of goods in Delaware to customers who lived in Maryland. It further appeared that in the case of some of these sales delivery was completed in the State of Delaware; in others the goods sold were delivered by common carrier to the customers at their residences in Maryland; in still others the goods sold were delivered to the customers at their residences in Maryland by trucks owned and operated by the appellant, such deliveries being made directly from the appellant's store in Wilmington, Delaware, to the residence of the Maryland purchaser. (R. 23, 25, 26)

After hearing argument the court denied appellant's petition to quash the writ of attachment and signed an order entering judgment against the appellant in the short note case for $363.00 with interest and costs, this being the full amount of the tax alleged to be due in connection with all

of the transactions described in the agreed statement of facts. (R. 32, 55, 51)

In his opinion, the trial judge (WARNKEN, J.) held (1) that the appellant had the right to defend this suit by raising the constitutional questions stated in its petition to quash the attachment above mentioned and overruled the contention of the State that the appellant should first have resorted to administrative remedies (R. 38); (2) that the appellant was engaged in business in the State of Maryland and could be required to collect and be made liable to the State of Maryland for the use tax on tangible personal property which it delivered in Maryland by its own trucks or by common carrier (R. 48); (3) that the State of Maryland had "no jurisdiction" to require appellant to collect or be liable for the use tax on tangible personal property purchased by Maryland residents in Delaware and personally brought by such residents into Maryland (R. 48); and (4) that since the tax was valid as to some transactions, the Comptroller of the State of Maryland had the legal right to make a deficiency assessment against it and the amount of the assessment could be attacked only by pursuing the administrative and court proceedings made available by the Maryland statutes. (R. 49) Accordingly, the assessment against the appellant on all sales was upheld, (R. 49, 50).

Appellant filed two appeals in the Court of Appeals of Maryland. One appeal was from the order of the court denying appellant's petition to quash and set aside the writ of attachment. (R. 57) The other appeal was from the judgment entered against appellant in the short note case. (R. 56)

The Court of Appeals affirmed both the judgment and the order by a final order entered on March 11, 1953. In its opinion, the court dealt first with the contention of the

State that appellant, by failing to follow the statutory administrative procedure, lost all right to attack the assessment. This contention was overruled, the court holding that the statutory procedures were inapplicable. In this connection the court said: (R. 122)

> "As appellant has not been regularly conducting its business in any County of the State or in Baltimore City, within the meaning of Section 348, it could not have followed the statutory procedure. Therefore, appellant was not precluded from challenging the validity of the assessment in the attachment case."

The Court of Appeals also held that appellant had the right to appear specially in such an attachment proceeding solely for the purpose of protecting its interest in the property attached and without subjecting itself personally to the jurisdiction of the court even though in order to protect its property it contested the validity of the State's claim. (R. 128)

The Court of Appeals also dealt with appellant's contention that it was not subject to those provisions of the Maryland statute which imposed upon vendors the burden of collecting use taxes and the liability to account therefor. The court held that while the appellant had not been "regularly conducting its business in any county of the State or in Baltimore City" and was not doing business in the State "within the meaning of the Foreign Corporation Law so as to subject itself to the State forum", it was nevertheless "engaged in business in this State" within the meaning of the Maryland Use Tax Law. (R. 123).

The court then held that the assessment of the tax against appellant did not infringe Article I, Section 8, of the Constitution of the United States vesting in Congress the power to regulate commerce with foreign nations and among the several states nor violate the Due Process Clause of the

Fourteenth Amendment of the Federal Constitution nor Article 23 of the Maryland Declaration of Rights which declares that no man ought to be deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land." Finding that there was no valid objection to the assessment, the court affirmed the judgment entered in the short note case in favor of the State and also the order in the attachment case denying appellant's petition to quash the attachment. (R. 129).

In affirming the judgment the Court of Appeals necessarily held (contrary to the opinion of the trial court) that the State could validly assess against appellant use taxes payable by Maryland customers who bought goods from the appellant in Delaware, took delivery there and thereafter themselves brought the goods into the State of Maryland. In the trial court the assessment had been held invalid to the extent that such cases were included but judgment had been entered against the appellant nevertheless because of failure to pursue appropriate administrative remedies. The Court of Appeals did not base its affirmance on this ground—in fact it specifically held that the administrative remedies were not available to the appellant—but rather on the ground that the assessment was in all respects valid and lawful.

All the requirements of Section 1257 (2) of Title 28 of the United States Code, 62 Stat. 929, have thus been met. The appellant by its pleadings filed in the trial court, by its counsel's oral argument in the trial court and memorandum of law filed therein, and by its appeal papers and brief filed in the Court of Appeals of Maryland and oral argument of its counsel therein, in each and every instance, drew in question the validity of a statute of the State of Maryland on the ground of its being repugnant to the Constitution of the United States, as applied to sales made by appellant.

The trial court considered this contention on its merits and held the statute valid in its application to two classes of transactions and invalid as applied to another. On appeal the Court of Appeals decided in favor of the validity of the statute in its application to all sales made by appellant to its Maryland customers. This was a final judgment rendered by the highest court of the State of Maryland in which a decision could be had. The jurisdiction of this Court on appeal is therefore clear. *Dahnke Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).

Question Presented

This appeal presents the question whether a Delaware merchant can be held liable to pay a use tax on goods sold in Delaware to residents of Maryland for use in Maryland, where the merchant's only contacts with Maryland are in the occasional use of the mails to transmit advertising matter to its regular customers and in the use of Maryland highways to deliver to some of its Maryland customers articles sold to them in Delaware.

Statutes Involved

The claim asserted by the State against the appellant is based upon the Maryland Use Tax Act (Chapter 681 of the Acts of 1947, as amended.) This statute has been codified as Sections 368-396, inclusive, of Article 81 of the Annotated Code of Maryland, 1951 Edition. It incorporates by reference a number of the provisions of the Retail Sales Tax Act (Chapter 281 of the Acts of 1947, as amended) which has been codified as sections 320-367, inclusive, of Article 81 of the Annotated Code of Maryland, 1951 Edition. The provisions of the statutes pertinent to this appeal are set forth in Appendix B hereto.

Statement of the Case

Appellant, Miller Brothers Company, is a Delaware corporation. It has never qualified or registered to do business in Maryland and has no resident agent in that state. It is engaged in the retail household furniture business. It has only one store, which is located in Wilmington, Delaware. It does not maintain any office, branch store, warehouse or other place of business in Maryland. It has no salesman or other employee in Maryland.

Appellant distributes, by an automatic card mailing system, about four pieces of advertising matter a year. By the very nature of such automatic mailing, these are mailed to everyone who has purchased from appellant and whose name and address are on appellant's records. Although Maryland residents do receive such mailing pieces, no advertising copy is mailed for the specific purpose of attracting Maryland buyers. Appellant has not sent any advertising copy to Maryland buyers alone, and the only advertising copy which these Maryland buyers receive is that which is sent to all customers whose names and addresses are on the records of appellant.

Most of the merchandise sold by appellant requires personal inspection and selection. Appellant maintains no mail-order business and does not accept orders by telephone. In all cases the purchaser (whether a Maryland or a Delaware resident) goes to appellant's store in Wilmington, Delaware, and there selects the items which he desires to purchase. Deliveries to Maryland purchasers are made in one of the following three ways and no other:

(1) The article is taken away by the purchaser.

(2) Appellant delivers the article in Wilmington, Delaware, to a common carrier which delivers the article in Maryland to the purchaser. The cost of delivery is borne solely by appellant.

(3) The article is delivered in Maryland to the purchaser, in a motor vehicle owned and operated by appellant, directly from appellant's store, storeroom or warehouse in Wilmington, Delaware, to the residence of the Maryland purchaser. The cost of delivery is borne solely by appellant.

On or about March 10, 1952, the Comptroller of the State of Maryland assessed a deficiency in use tax against appellant in the amount of $356.40. This assessment included use taxes alleged to be due on all sales made by appellant to its Maryland customers during the period July 1, 1947, through December 31, 1951, together with interest and penalty. Sales in which the purchaser took delivery in Delaware were included among those on which the use tax was claimed. Also included were sales where delivery was made in Maryland by common carrier or in appellant's own trucks.

Appellant, through its counsel, having advised the Comptroller that the Company intended to ignore the assessment, the State of Maryland instituted attachment proceedings in the Superior Court of Baltimore City. A full description has already been given of these proceedings leading to the final judgment of the Court of Appeals of Maryland upholding the validity of the assessment in all respects.

The Question Is Substantial

The tax involved in this case is imposed under the authority of a Maryland statute which purports to tax the use in Maryland of articles purchased outside the state. The assessment against appellant which has been upheld by the Court of Appeals of Maryland included taxes on the use of articles sold to Maryland purchasers who actually took delivery at appellant's Delaware store as well as on the use of articles which were delivered to Maryland purchasers

either by common carrier or by trucks owned and operated by appellant.

1. The ruling of the Court of Appeals of Maryland goes beyond any case previously decided by this or any other court and represents a novel extension of the power of a state to impose burdens on those who do business beyond its territorial limits.

The cases relied upon by the Court of Appeals are all readily distinguishable. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62 (1939) upheld a California statute requiring retailers who maintained a place of business in the state to collect and pay to the state a use tax on all goods sold to residents of the state. In that case it appeared that the vendor was doing business in California on an extensive scale. It employed California agents who devoted their full time to soliciting business. It leased offices in its own name in California and paid the rent therefor. The statement in the opinion of the Court of Appeals of Maryland in the present case that the vendor in the *Gallagher* case "did not carry on any intrastate operations in California and was not subject to its jurisdiction" is therefore manifestly erroneous.

In *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939) the Southern Pacific Company, which operated a railroad in the State of California, sought to enjoin the collection from it of the California use tax on tangible personal property purchased by it outside of the state and installed on importation or kept available for use as a part of its transportation facilities. Plainly, the decision in that case has no relevance to the issues presented by the present appeal.

Nelson v. *Sears Roebuck & Co.*, 312 U. S. 359 (1941), upheld the right of Iowa to collect from the vendor a use tax on mail-order business conducted directly between customers in Iowa and the vendor's mail-order houses located outside the state. In that case the vendor was a New York

corporation authorized to do business in Iowa which maintained various retail stores there. A majority of the Court over the protest of Mr. Justice ROBERTS and Chief Justice HUGHES held that since Iowa had extended to the vendor the privilege of doing business through its retail stores in that state, Iowa could exact the burden of collecting the use tax on mail-order business "as a price of enjoying the full benefits flowing from its Iowa business."

Nelson v. *Montgomery Ward & Co.*, 312 U. S. 373 (1941), reached the same result on substantially identical facts. However, the Court called attention to the fact that the retail stores of Montgomery Ward & Co. had printed advertisements in the state of Iowa advertising not only retail merchandise but the ability to complete service through the use of the mail-order catalogue as well. This solicitation "through local advertisements" was held to be substantially equivalent to the solicitation "directly by local agents as in *Felt & T. Mfg. Co.* v. *Gallagher*, 306 U. S. 62".

In both the *Nelson* cases the vendor sought to be taxed was qualified to do business in the taxing state and carried on a substantial volume of business there. Mr. Justice DOUGLAS speaking for the court emphasized this as the controlling fact and clearly implied that Iowa would otherwise be impotent to reach the vendors. (See 312 U. S. at p. 364.)

In *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. 335 (1944), the State Tax Commission of Iowa brought suit against a Minnesota corporation to recover use taxes on goods shipped by common carriers or the post from Minnesota to residents of Iowa. The vendor appeared voluntarily to the action and assailed the validity of the Iowa statute as applied to it. It appeared that traveling salesmen employed by the vendor had solicited the orders in Iowa but that the vendor maintained no office, branch or warehouse in that state. This Court upheld the right of Iowa to collect the tax from the Minnesota vendor, over the vigorous dis-

sent of Mr. Justice JACKSON and Mr. Justice ROBERTS. Mr. Justice RUTLEDGE, concurring, pointed out that the evidence in that case warranted the conclusion that the Minnesota vendor had been engaged in "continuous, regular, and not intermittent or casual courses of solicitation". See 322 U. S. at p. 354.

In striking contrast to the cases cited by the Court of Appeals, the present record shows that appellant has engaged in no activities in the State of Maryland except the use of the mails to transmit advertising material and use of the highways to deliver merchandise. We find no decision of this or any other court that holds that jurisdiction to tax can be based on any such tenuous thread.

In the courts below, the State argued that the Maryland statute did not impose a tax on appellant but merely the duty to collect a tax. It is submitted that this is a mere play on words. It is true that the tax is one which appellant can lawfully pass on to its customers and that the customer is the person primarily liable. The fact remains, however, that the claim of the State upheld in the courts below, is to collect a tax from appellant. As the declaration of the State in the short note case shows, "the Comptroller has assessed a deficiency in use tax" against this appellant. If this is not a tax, then one wonders what term could be used to describe it.

2. The ruling of the Court of Appeals creates an incongruous practical situation which will have important consequences in confusing interstate business. If upheld, it will extend the power of the Comptroller of the State of Maryland beyond the powers of the courts of that state. The appellant is not subject to suit in Maryland and has declined to submit itself to the jurisdiction of the Maryland courts. It has ignored the attempt of the State to tax it and when its personal property was seized by attachment, it appeared in the Maryland courts solely for the purpose of defending its

interest in the property attached. The Court of Appeals of Maryland has recognized the fact that appellant is beyond the reach of the Maryland courts and that no personal judgment can be entered against it. The following quotation from the opinion of the Court of Appeals speaks for itself:

> "In such a case the court has jurisdiction over the property attached, but does not have jurisdiction over the person of the defendant. In support of this rule, the American Law Institute states: 'If the court thereby acquires jurisdiction over him personally, in spite of his protestation that he does not intend to submit himself personally to the jurisdiction of the court, he has been placed in a difficult dilemma. He has been compelled either to lose his property, even though the claim against him is unfounded, or to submit himself personally to the jurisdiction of the court which otherwise could have no power over him.' Restatement, Judgments, sec. 40.
>
> "But even acknowledging that appellant, a foreign corporation, was not subject to the State's jurisdiction, we hold that appellant may be held liable for the collection of the use tax from its Maryland customers."

The attempt of the State of Maryland to collect the Maryland use tax from those situated as is the appellant falls afoul of territorial limitations. Obviously the provisons of the statute which purport to give the Comptroller of the State the power to examine appellant's books are wholly nugatory. The Comptroller of Maryland cannot reach into Delaware any more than can the courts of that State. The only avenue open to the State to exercise the powers which the Court of Appeals has now conferred upon it is to make arbitrary assessments and then to seize vehicles engaged in interstate movement, a dramatic illustration of the fundamental vice in the rulings below. Cf. *Buck* v. *Kuykendall*, 267 U.S. 307 (1925).

3. The decision of the Court of Appeals is not only novel and important but is also erroneous. To hold that a vendor

is required to pay a use tax because of contacts with the taxing state, which are insufficient to give the courts of that state jurisdiction to enforce the tax, is to fly directly in the teeth of the Fourteenth Amendment. Cases such as *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) make it clear that the power of the courts of the state to extend their jurisdiction over foreign corporations is limited by considerations substantially identical with those which limit the power to tax. Compare *McLeod* v. *Dilworth*, 322 U.S. 327 (1944).

Even more plain is the conflict between the ruling of the Court of Appeals and the Commerce Clause of the Federal Constitution. If the State of Maryland can make appellant liable for this tax merely because it uses the mails or the highways of the State to make deliveries to its customers, then indeed the freedom of movement across state borders, which ever since *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824) has been recognized as the great object of the Commerce Clause, is at an end. We know from recent decisions of this Court that the states may not exact a tax for the privilege of doing interstate business nor levy a tax upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself. *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, 88-89 (1948); *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 608-609 (1951). Particularly offensive is any attempt of the states to exercise their regulatory power so as to protect the local economy from the effect of interstate commerce. *Buck* v. *Kuykendall*, 267 U.S. 307 (1925) and *Bush* v. *Maloy*, 267 U.S. 317 (1925), struck down attempts of the states to exclude interstate motor carriers in order to limit competition. *Baldwin* v. *Seelig*, 294 U.S. 511 (1935), condemned legislation prohibiting the sale within the state of milk brought into the state and bottled there for which less than a minimum price had been paid to the producer in another state. *Hood* v. *Dumond*, 336 U.S.

525 (1949), set aside a law which the state courts had construed to authorize denial of a permit to a corporation engaged in distributing milk across state lines to build a new milk receiving station, the purpose of the denial being to protect other local distributors from destructive competition and to insure a needed supply to the local market.

In dealing with this question, the Court of Appeals of Maryland relied upon cases such as *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937) and *McGoldrick* v. *Berwind White Coal Min. Co.*, 309 U.S. 33 (1940). But in those cases the taxes upheld were imposed upon those who used or sold property within the borders of the taxing state. Here, whatever may be pretended to the contrary, the tax is imposed not on the user but upon the non-resident vendor. The truly significant part of the *Henneford* decision is the caution of Mr. Justice Cardozo that "a tax upon a use so closely connected with delivery as to be in substance a part thereof, might be subject to the same objections that would be applicable to a tax upon the sale itself." See 300 U.S. at p. 583. *McLeod* v. *Dilworth*, 322 U.S. 327 (1944) makes it plain that any attempt on the part of the State of Maryland to tax the sales involved in the present case would fall afoul of the Federal Constitution.

Thus it appears that the ruling of the Court of Appeals of Maryland decides a question of constitutional law which is new and which is important, in a manner which appears to be in conflict with the doctrines pronounced in prior decisions of this Court. It follows that the questions presented are substantial and of public importance.

Respectfully submitted,

JAMES PIPER,
WILLIAM L. MARBURY,
WILLIAM POOLE,
JAMES L. LATCHUM,
Counsel for Appellant.

APPENDIX "A"

I

[Opinion of Judge Warnken in the Superior Court of Baltimore City]

Opinion

(Filed August 11, 1952)

This is an attachment proceeding by the State of Maryland to collect from Miller Brothers Company, a corporation, use taxes imposed by the Maryland Retail Sales and Use Tax Act, sections 259 to 336, inclusive, of Article 81 of the Annotated Code of Maryland (1947 Supp.), hereinafter referred to as the Act, in the amount of $356.40, which includes interest and penalty. The tax is an excise tax "levied and imposed on the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State for use, storage or consumption within this State." The tax is required to be paid by the purchaser. It is at the rate of two cents per dollar of the sale price (§ 309). Section 311 requires the vendor to collect the tax from the purchaser, and by Section 315 the vendor is made personally liable to the State for the amount uncollected.

The proceeding was filed under Section 156 of Article 81 of the Code, which gives the State the right to resort to attachment, whether the defendant be a resident or non-resident of the State. A station wagon of the defendant was seized by the Sheriff and appraised in this proceeding at $800.

Defendant filed a motion to quash the attachment on the ground that, if the Maryland Use Tax Law be construed to require the defendant to make the collections mentioned, the law is void because it violates (1) the due process clause of the Fourteenth Amendment of the Constitution of the United States, (2) Article 23 of the Declaration of Rights of the Constitution of Maryland, and (3) Section 8 (Commerce Clause) of Article 1 of the Constitution of the United States. The State contends that the grounds to

quash relate to the merits of the claim and not to a defect in the papers or procedure or the right to maintain the attachment, if the claim is valid. The case was heard on an agreed statement of facts and it was also agreed that if the motion to quash is denied the reasons given therein shall be considered as a plea in bar to the short note case. As defendant desires the substantive questions determined, the motion to quash will be denied and the short note case determined.

The agreed facts, substantially as summarized by defendant, are as follows. The period involved is July 1, 1947 to December 31, 1951. The Company (defendant) is a Delaware corporation. It has only one store, a retail household furniture store in Wilmington, Delaware. In addition to its Delaware customers, the Company has made, during said period, and does make certain sales of tangible personal property to residents of Maryland, who have used, consumed or stored such purchased personal property in Maryland. The customers appear at such store in Wilmington, Delaware, and select the items of furniture which they wish to purchase. Some of the items sold are the very items selected by the customers, and some are identical to those selected but are delivered from the Company's storeroom or warehouse in Wilmington, Delaware. Deliveries to Maryland purchasers are made in one of the following three ways and no other:

(1) The article is taken away by the purchaser. During said period tangible personal property sold for at least $2500 was so delivered.

(2) The Company delivers the article in Wilmington, Delaware, to a common carrier which delivers the article in Maryland to the purchaser. The cost of delivery is borne solely by the Company. During said period tangible personal property sold for at least $1500 was so delivered.

(3) The article is delivered in Maryland to the purchaser, in a motor vehicle owned and operated by the Company, directly from the Company's store in Wilmington, Delaware, to the residence of the Maryland purchaser. The cost of delivery is borne solely by the Company. During said period tangible personal property sold for at least $8000 was so delivered.

Payment for some purchases is completed at the time the purchaser appears at the Company's retail store and prior to the delivery. Other sales are made on credit including some sales made to customers who reside in Maryland. In some such cases, including some sales to Maryland customers, the Company enteres in to conditional sales contracts and in others the terms of the credit transactions are simply noted on a sales slip, in which case the transaction is frequently designated as a sixty or ninety-day charge account.

The Company employs no solicitors or salesmen who operate in the State of Maryland. It has from time to time mailed advertising matter to its customers whose names and addresses are on its records, including those who reside in Maryland, it has advertised regularly in newspapers published in Wilmington, Delaware, which have some circulation in some parts of Maryland, and it has broadcast programs containing radio or television advertising over stations located in Wilmington, Delaware, and these programs could have been received within the State of Maryland. No special solicitation has ever been directed to Maryland residents. The Company has never qualified or registered to do business in the State of Maryland nor has it any assets physically located in this State. The station wagon attached in this particular case is used by the Company in making deliveries to its customers.

Most of the pertinent sections of the law are as follows:

> 311. Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State, which are taxable under the provisions of this sub-title, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser.
>
> 308(k). "Engaged in business in this State" means the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use,

storage or consumption within this State. This term shall include, but shall not be limited to the following acts or methods of transacting business.

(1) The maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, of any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

(2) The having of any representative, agent, salesman, canvasser, or solicitor operating in this State for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

313. Every vendor required or permitted to collect the tax shall collect the tax imposed by the provision of this sub-title, notwithstanding the following:

(a) That the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the vendor at a point outside of this State as a result of solicitation by the vendor through the medium of a catalog or other written advertisement; or

(b) That the purchaser's order or contract of sale made or closed by acceptance or approval outside of this State or before said tangible personal property enters this State; or

(c) That the purchaser's order or contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this State and shipped directly to the purchaser from the point of origin; or

(d) That said property is mailed to the purchaser in this State from a point outside this State or delivered to a carrier at a point outside this State, F.O.B., or otherwise, and directed to the vendor in this State, regardless of whether the cost of transportation is paid by the vendor or by the purchaser; or

(e) That said property is delivered directly to the

purchaser at a point outside this State, if it is intended to be brought to this State for use, storage or consumption in this State.

324. The vendor or person subject to tax as provided in this sub-title shall be entitled to apply and credit against the amount of tax payable by him as stated in Section 323, an amount equal to three per cent (3%) of the gross tax to be remitted to the Comptroller to cover the expense in the collection and remittance of said tax; provided, however, that nothing contained in this section shall apply to any vendor or person who shall fail or refuse to file his return with the Comptroller within the time prescribed by Sections 320 and 322 of this sub-title.

The defendant makes two principal contentions, (1) that as a matter of construction the Act is not applicable to it because it is not "engaging in business in this State" and (2) if the Act is construed to apply to it because it is "engaging in business in this State" then the Act is invalid because it violates the Federal and Maryland Constitutions in the respects above mentioned.

Before these questions are determined it is necessary to consider the contention of the State that the defenses set up by the defendant can not be considered in this proceeding because the defendant has not followed the procedure set forth in the Act to have its liability and the amount thereof reviewed by the Comptroller, and, if dissatisfied, by the appropriate court and eventually the Court of Appeals.

The State relies on Sections 286, 287 and 288 of Article 81, which were enacted as part of the Act. Section 287 provides that "any taxpayer may apply to the Comptroller for revision of the tax assessed against him", who is then required to take such action as he deems just and notify the taxpayer of the action taken. The latter may within a specified time request a formal hearing before the Comptroller. After the hearing the Comptroller is required to make a determination and notify the taxpayer. Section 288 provides that the taxpayer, if dissatisfied with the determina-

tion of the Comptroller, may, within a time specified, appeal "to the Circuit Court for the County in which the taxpayer regularly conducts his business, or to the Baltimore City Court if the taxpayer regularly conducts his business in Baltimore City. Such appeal shall be limited to questions of law only. * * *." If the taxpayer or the State is dissatisfied with the determination of the Court either may appeal to the Court of Appeals of Maryland.

Section 286 is as follows:

> "No injunction or writ of mandamus or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or any officer or employee thereof to prevent or enjoin the collection under this sub-title of any tax sought to be collected, and no suit or proceeding shall be maintained in any court by any taxpayer for the recovery of any amount of taxes alleged to have been erroneously or illegally assessed or collected except as is provided by Sections 287-288, inclusive, of this sub-title."

With respect to the latter section defendant's position is that it has no relation to the present proceeding, because this is not a suit, action or proceeding against the State of Maryland or any officer or employee thereof, nor is any injunction or writ of mandamus or other legal or equitable process sought against the State or any officer or employee thereof; and that this is not a suit or proceeding by a taxpayer for the recovery of taxes alleged to have been erroneously or illegally collected. That in this case defendant is seeking merely to defend its property.

Defendant also contends that Sections 287 and 288 are based on the assumption that defendant was engaged in the regular conduct of business in Baltimore City or in one of the counties and that such is not legally correct. Therefore, in order to invoke the right of appeal to the courts under Section 288, defendant would have been compelled to make a concession which would not only be contrary to fact but which would be highly prejudicial to its entire case, since it claimed the invalidity of the State's imposition of the tax on defendant arises out of the very fact

that defendant is not conducting its business within Maryland. Therefore an application to the Comptroller would be sterile because defendant would have no means of court review as it does not regularly conduct its business in any of the subdivisions of the State.

Defendant refers to *Schneider v. Pullen,* 81 A. 2d 226 (1951) in which the Court sustained the right of a person conducting a trade school to seek a declaratory decree as to the invalidity of a statute and regulations thereunder, requiring private trade schools to obtain certificates from the State Superintendent of Schools. The Court held "that where a special form of remedy is provided, the litigant must adopt that form and must not bypass the administrative body or official by pursuing other remedies." But it was held "that where constitutional questions are involved, the litigant has the right to raise them", the Court "has the right to consider them", and "the legislature cannot interfere with the judicial process by depriving litigants from raising questions involving their fundamental rights in any appropriate judicial manner, nor can it deprive the courts of the right to decide such questions in an appropriate proceeding."

The State insists that the last mentioned case involved complete invalidity of the statute as to everyone and not its inapplicability to particular persons. After consideration of the arguments of the parties and the cases cited by them on this point, I conclude that defendant has the right to defend this suit by raising the constitutional questions above mentioned. Section 286 is not applicable; defendant is not taking the initiative but is merely defending its property. Sections 287 and 288 seem to relate to persons who, admitting they are subject to the Act, dispute the correctness of the proposed assessment. In any event said sections do not prevent a person resisting on constitutional grounds an asserted claim of liability against him.

The defenses to the claim will now be considered.

1. Defendant advances a construction of the Act which would avoid deciding the constitutional questions which it has raised. The contention is that its activities in the State and in connection with sales of merchandise and deliveries

thereof to residents of the State do not constitute "engaging in business in this State" which is used in Section 311 and elsewhere in the Act. Reference is made to Section 308(k) which defines the meaning of "engaged in business in this State" as "the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State." The section also states that the term should include, *but shall not be limited to*, the following acts or methods of transacting business. There are then set forth in two paragraphs certain "acts or methods of transacting business." Defendant says it is not engaged in any of such acts or methods. It is specifically stated in the Act that the meaning of the term quoted is not limited to the particular acts or methods of transacting business. It is also argued that provisions in other sections of the Act imply the maintenance of a place of business within this State.

In *General Trading Co. v. State Tax Commission of Iowa*, 322 U. S. 335, it appears from the opinion of the Supreme Court of Iowa, 233 Iowa 877, that a "retailer maintaining a place of business in this state" was required to collect the use tax on the sale price of property which it sold to a purchaser in Iowa. The Court in deciding the question raised here said:

> "The contention is that defendant is not a 'retailer maintaining a place of business in this state,' as defined by paragraph 6 of said section 6943.102. The answer asserts facts from which it appears that, if the phrase were to be given its ordinary meaning, defendant is not such a retailer. But we are dealing with a statutory definition. The Tax Commission points out that the statute provides that a 'retailer maintaining a place of business in this state' shall include 'any retailer having * * * within this state * * * any agent operating within this state under the authority of the retailer * * * irrespective of whether such * * * agent is located here permanently or temporarily, or whether such retailer * * * is admitted to do business within this state.' The language is sufficient to include defendant within the terms

of the statutory definition. We cannot shut our eyes to the words of the statute. The use of the words is the prerogative of the legislature. Our only function is to interpret the words which it has used. The trial court was right in holding that defendant's operations bring it within the letter and the language of the statute." (pp. 880-881).

The Supreme Court accepted the lower appellate court's finding (322 U.S. 335). In that case the vendor maintained no place of business and was not qualified or registered to do business in that state. It sent traveling salesmen from Minnesota into Iowa, none of whom lived in Iowa or had headquarters there. They solicited orders for merchandise in Iowa which orders were subject to acceptance or rejection at vendor's office in Minnesota. The salesmen were not authorized to make, and did not make, any contracts in Iowa. In filling such orders as were accepted merchandise was shipped from Minnesota into Iowa by delivery to common carriers, truck or rail, or by delivery to United States Postal Department; the purchasers paid all costs of transportation by carrier or parcel post.

I do not construe the phrase "engaged in business in this State" as meaning the same as doing business in the state in the sense of being suable there and subject to process on claims growing out of transactions in other states. The facts in the General Trading Company case and the case at bar are not importantly different. In that case the physical presence of employees or agents of the vendor in Iowa preceded the contract of purchase and consisted of solicitation. In the case at bar the solicitation was made by mail but the deliveries were made by defendant's agent or employee in its own truck or, at the expense of defendant, by common carrier. I, therefore, find that defendant is engaged in business in this state within the meaning of the Act.

2. It is contended by defendant that it is not doing business in Maryland in the sense that these words have always been understood by our Court of Appeals, and that there is grave doubt that the legislature could define the term in such a way as to include defendant without violation of Article 23 of the Declaration of Rights. The exact point

as expressed by defendant does not have to be resolved. In the first place there is nothing in the Act to indicate that the legislature in using the expression "engaged in business in this State" had reference to the much older expression "doing business in this State." The two phrases have different connotations, depending upon the context in which they are used and the subject matter. Doing business in the State so as to be subject to the local jurisdiction for the purpose of service of process and suit in the State (*M. J. Grove Lime Co. v. Wolfenden*, 171 Md. 299), is essentially different from engaging in business for the purpose of collecting the use tax. Without further elaboration, I find no violation of Article 23 of the Maryland Declaration of Rights.

3. Sales taxes are not new. They have been the subject of judicial consideration, according to Mr. Justice Stone in *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 51 (1940), for more than seventy years. Their asserted invalidity is almost always based on the Commerce Clause and the Fourteenth Amendment. In recent years the necessity of finding new sources of revenue has caused more states to resort to a sales tax law and its complement, use tax law, and, in connection with the latter, to endeavor to require out of state vendors to collect from purchasers the tax on merchandise which the vendor delivers in the state. Many of the latter situations have been submitted for judicial determination as to their validity under the Federal Constitution. In such tests of constitutionality the boundary line is narrow. A situation in a particular case, which was thought to be the reason for the result, has been brushed aside as irrelevant or unimportant in later cases. This judicial process has greatly clarified a complicated but important subject matter. No useful purpose would be served in analyzing and discussing all of the numerous cases cited by counsel. A reference to some of the more recent cases should be sufficient.

The teaching of the cases is that considering the necessity of reconciling the competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed, it is only when state action amounts to an undue regulation or

burden that it violates the Commerce Clause. The subject of state power in relation to the Commerce Clause is very fully elaborated by Mr. Justice Stone in the McGoldrick case and most of the sales and related tax cases are cited and discussed. Rather full excerpts from the opinion of some of the basic and fundamental matters at this point of the discussion may be helpful.

That case involved a sales tax enacted by New York City of 2% of each sale, imposed on the purchaser, and required the seller to collect it for the City. "Sale" was defined as "any transfer of title or possession, or both * * * in any manner or by any means whatsoever for a consideration or any agreement thereof." Defendant, a Pennsylvania corporation, maintained a sales office in New York City. It mined coal in Pennsylvania and shipped by rail to dock in Jersey City and thence by barge to customers in New York City. All the sales contracts with the New York customers were entered into in New York City. In sustaining the validity of the law the Court said:

> "Section 8 of the Constitution declares that 'Congress shall have power * * * to regulate commerce with foreign Nations, and among the several States * * *.' In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. See *Gibbons v. Ogden*, 9 Wheat 1, 187; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185. Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states."
>
> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of

their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock v. Bureau*, 303 U. S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress."

After referring to a number of state taxes which had been upheld, the Court continued:

"In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.

* * *

It [New York tax] does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce, sustained in *Monamotor Oil Co. v. Johnson*, 292 U. S.

86; *Henneford v. Silas Mason Co., supra; Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U. S. 62; *Southern Pacific Co. v. Gallagher,* 306 U. S. 167."

In the colloquy between counsel and the Court at the hearing, counsel for defendant admitted that ultimately the constitutional defenses above mentioned depend upon a finding that the difference in the facts in the case at bar and the facts in the *General Trading Company* case require a different legal conclusion. After careful study of the numerous Supreme Court decisions, I regard the difference between the two cases as unimportant with respect to the constitutional questions involved. It would seem from the "group" of sales and use tax cases that there must be some activity on the part of the ex-state vendor in the state in which the purchaser resides in order to give the latter state jurisdiction over said vendor. It would also appear that in considering the constitutional defenses mentioned there is a difference between a sales tax *as such* imposed on the ex-state vendor and a use tax imposed on the purchaser, with respect to which the ex-state vendor is required to be the tax collector for the state imposing the tax. Compare *General Trading Co. v. State Tax Commission of Iowa, supra,* and *McLeod v. Dilworth Co.,* 322 U. S. 327, in which, from an examination of the appellate court opinions of Iowa and Arkansas, 233 Iowa 877 and 205 Arkansas 780, and the Supreme Court opinions in these cases, the method of doing business and the activity of the ex-state vendors in the taxing states seem to be identical.

In General Trading Company case the solicitation in the state was by traveling salesmen from Minnesota. The orders that were obtained were subject to acceptance or rejection at the vendor's office in Minnesota. The orders which were accepted were shipped F.O.B. the Minnesota office. In the instant case the Maryland purchasers are solicited by advertising matter sent through the mail. Obviously orders must be accepted at the Wilmington office of the defendant. In General Trading Company delivery was made by postal authorities and common carrier at the expense of the purchaser. In the instant case some deliveries are similarly made, *i.e.*, common carrier, at the expense of de-

fendant; most of the deliveries are made at the residence of the Maryland purchasers by the agent of defendant in its truck, which of course has to enter and use the facilities of Maryland to do so. There is, therefore, activity on the part of defendant in Maryland in the solicitation of orders and there is physical entrance into the state for the purpose of delivering the merchandise ordered. To require defendant to collect the use tax on such merchandise as it delivers in the state, either by its own vehicle or by engaging a common carrier at its expense, does not in my opinion unduly regulate or burden or discriminate against interstate commerce so as to make the Act invalid under the Commerce Clause.

In 1941 the cases of *Nelson v. Sears, Roebuck & Co.* and *Nelson v. Montgomery Ward & Co.*, 312 U. S. 359 and 373, were decided. The facts were substantially the same in the two cases. Each mail order house maintained stores and conducted business in Iowa. They disputed the constitutional right of Iowa to require it to collect a use tax with respect to merchandise ordered directly by residents of Iowa from out of state branches of the vendors, which orders were filled by direct shipments by mail or common carrier from the branches to the purchaser, it being admitted that such orders were not solicited or placed by any of the vendor's agents in Iowa. In sustaining the obligation of the vendors to collect the use tax for Iowa on such mail order business, the Court said:

> "Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out of state mail order houses which need not and do not collect the tax on their Iowa sales. But those other concerns are not doing business in the State as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price. Respondent further stresses the cost to it of making these collections and its probable loss as a result of its inability to collect the tax on all sales. But

cost and inconvenience inhered in the same duty imposed on the foreign corporations in the *Monamotor* and *Felt & Tarrant* cases. And so far as assumed losses on tax collections are concerned, respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents, or to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid.

"Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem" (pp. 365-366).

After the Nelson cases the effort was made to distinguishing other use tax cases because of the difference in the method of conducting the business. These efforts were brushed aside by Mr. Justice Frankfurter speaking for the majority in the General Trading Company case, supra, pp. 337-339, as follows:

"We brought the case here, 320 U. S. 731, to meet the claim that there was need for further precision regarding the scope of our previous rulings on the power of States to levy use taxes. In view, however, of the clear understanding by the court below that the facts we have summarized bring the transaction within the taxing power of Iowa, there is little need for elaboration. We agree with the Iowa Supreme Court that *Felt & Tarrant Co. v. Gallagher*, 306 U. S. 62; *Nelson v. Sears, Roebuck & Co., supra;* and *Nelson v. Montgomery Ward & Co., supra*, are controlling. The *Gallagher* case is indistinguishable—certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine for shipment from without a State as in the *Gallagher* case, compared with the comparatively simpler needs for soliciting business in this case. And

the fact that in the *Sears, Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the State. All these differentiations are without constitutional significance. Of course, no State can tax the privilege of doing interstate business. See *Western Live Stock v. Bureau*, 303 U. S. 250. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See *Best & Co. v. Maxwell*, 311 U. S. 454.

"None of these infirmities affects the tax in this case any more than it did in the other cases with which it forms a group. The tax is what it professes to be—a nondiscriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device. *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93-94; *Felt & Tarrant Co.* v. *Gallagher, supra.*"

The power of a state to require the ex-state distributor to collect the use tax as its agent was also sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, referred to therein as "a common and lawful arrangement"; *Felt & Tarrant* v. *Gallagher*, 306 U. S. 62; *McGoldrick* v. *Berwind-White*, *supra.*

Defendant denies the jurisdiction of Maryland over it on the ground that it must be found that defendant is engaged in business in Maryland, and a prerequisite to such finding is that its solicitation or deliveries in Maryland must be regular, continuous and persistent, which terms are used in *Nippert* v. *City of Richmond*, 327 U. S. 416, involving a municipal ordinance imposing a license tax on solicitors, which was held to violate the Commerce Clause. Whether either solicitation or deliveries are regular, continuous or persistent is necessarily relative, depending upon the particular business. No point to that effect was made in *General Trading Company*, and in the instant case the agreed facts do not show that there was not such an activity by defendant. According to the agreed facts, solicitation by mail occurred four times a year, while there are no details with respect to deliveries except the admitted fact that the deliveries by common carrier of merchandise sold for $1500 and by the company's own vehicle of merchandise sold for $8000 constitutes almost 80% of all tangible personal property sold during the period in question to residents of Maryland. I cannot find from the agreed facts, considering the nature of defendant's business, that its solicitations and deliveries in Maryland were not regular and continuous as opposed to casual and spasmodic. Indeed it is implied in *Nippert* v. *Richmond*, *supra*, page 426, that the making of delivery, if it consists of a course of business, may constitute "doing business" in the state.

4. I, therefore, conclude that the State has jurisdiction to require defendant to collect for it the use tax on tangible personal property which it delivers in Maryland by its own truck or by common carrier. I also conclude that the State has no jurisdiction over defendant with respect to such property purchased by Maryland residents at Wilmington and personally brought by such residents into Maryland. This question was mentioned but not decided in a foot note in *Nelson* v. *Montgomery Ward & Co.*, *supra*, page 374. The exact question was whether Montgomery Ward & Co., which qualified and was doing business in Iowa, could be required to collect the tax on sales made by its other stores located in other states near the Iowa border.

In the dissenting opinion of one judge of the Supreme Court of Iowa, 228 Iowa 1303, who took the same view as the Supreme Court of the United States as to the mail order sales, it was said that the imposition on the vendor of such "an almost impossible task" would be "a burden so unreasonable, arbitrary and capricious as to invade its constitutional rights under the due process clause of the Federal Constitution" and would, therefore, be invalid. I think the Maryland Act cannot reach such transactions because Maryland can not project its jurisdiction into another state, even though the latter is so near the Maryland border that some residents of the latter may circumvent the Use Tax Act.

The latter conclusion does not, however, affect the right of the State to recover the assessment against defendant on such sales which, according to the stipulation, amount to $2500 during the period in question. As the defendant has been found to be "engaged in business" within the meaning of the Act, the Comptroller had the legal right to make the deficiency assessment against it, and impose the interest and penalties that are included in the amount involved in the short note case. In the light of the conclusion defendant could have proceeded under the above mentioned Sections 287 and 288 of Article 81 to have this particular assessment revised. It, therefore, should have pursued the administrative remedies with respect to said item. Defendant elected to stand on what it considered its constitutional rights and defend against the effort to collect *any* of the claim from it. I think it had the right to do so, but, after it is found to be subject to the Act, it is too late to have the *amount* of its liability revised and redetermined. However, as this is in the nature of a test case, its future conduct can be governed accordingly.

A formal order may be presented for the entry of judgment in the short note case for the plaintiff for the amount of its claim with interest and costs.

S. RALPH WARNKEN.

APPENDIX "A"

II

OPINION OF THE COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1952—Filed March 11, 1953

No. 93

MILLER BROTHERS COMPANY

vs.

STATE OF MARYLAND

Two appeals in one record from the Superior Court of Baltimore City. S. Ralph Warnken, Judge.

Argued before Delaplaine, Collins and Henderson, JJ.

DELAPLAINE, *J.:*

These two appeals test the constitutionality of the Maryland Use Tax Act, Code 1951, art. 81, secs. 368-396, as applied to furniture sold by appellant, Miller Brothers Company, a Delaware corporation, at its store in Delaware and delivered to purchasers residing in Maryland.

The tax is an excise imposed by the Legislature on "the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State * * * for use, storage or consumption within this State." The Act expressly provides in Sec. 369 that the tax shall be paid by the purchaser and shall be computed as follows: (a) on each sale where the price is from 51 cents to $1, both inclusive, 2 cents; (b) on each 50 cents of price or fraction thereof in excess of $1, 1 cent. The tax is paid by the purchaser to the vendor, as trustee for the State, and the vendor is liable for the collection for the State.

The State entered suit against appellant on March 19, 1952, to recover $356.40 assessed by the State Comptroller as deficiency in use tax in the period from July 1, 1947, to December 31, 1951. The State also filed a non-resident attachment suit against appellant and attached a station

wagon owned by it. Appellant, appearing specially, filed a petition to quash the writ of attachment on the ground that the assessment was unconstitutional. The State answered that appellant had neither applied for a revision of the assessment nor paid the tax and applied for a refund, and prayed that the petition to quash be dismissed because (1) the collection of use taxes may be contested only by the proceeding set forth in the statute, and (2) the assessment was authorized by statute and was constitutional.

In the short note case the Court entered judgment in favor of the State for $363, and in the attachment case it passed an order denying the petition to quash. We have been asked to review both the judgment and the order.

At the outset the State made the objection that if appellant desired to contest the assessment, it should have applied to the State Comptroller for a revision of the assessment; and that, having failed to do so, it was precluded from contesting it in the attachment case. It is entirely true that the courts do not favor the by-passing of administrative agencies, except where there is a clear necessity for a prior judicial decision. We have accordingly held that where a special form of remedy is provided by statute, the litigant should resort to that form rather than pursue other remedies, although where a constitutional issue is raised, and there is no danger of by-passing administrative action, the question may properly be decided in a suit for injunction or declaratory decree before the time has arrived for invoking the statutory remedy. Kahl vs. Consolidated Gas, Electric Light & Power Co., 191 Md. 249, 258, 60 A. 2d 754; Commissioners of Cambridge vs. Eastern Shore Public Service Co., 192 Md. 333, 64 A. 2d 151; Francis vs. MacGill, Md., 75 A. 2d 91; Kracke vs. Weinberg, Md., 79 A. 2d 387; Schneider vs. Pullen, Md., 81 A. 2d 226; Reiling vs. State Comptroller, Md., 94 A. 2d 261.

The Retail Sales Tax Act and the Use Tax Act provide that any taxpayer may apply to the Comptroller for revision of the tax assessed against him, and the Comptroller shall act promptly upon the application and notify the taxpayer of his action. Any taxpayer dissatisfied with the final determination of the Comptroller may appeal therefrom to the Circuit Court for the County in which the tax-

payer regularly conducts his business or to the Baltimore City Court if the taxpayer regularly conducts his business in Baltimore City. The taxpayer, or the Attorney-General on behalf of the State, or the Comptroller may, within 30 days from the final order entered by the Court, appeal to the Court of Appeals of Maryland, Code 1951, art. 81, secs. 347, 348, 394.

Appellant is a foreign corporation. It has never qualified or registered to do business in Maryland and has no resident agent in this State. It is engaged in the retail household furniture business. It has only one store, which is located in Wilmington. It does not maintain any office, branch store, warehouse or other place of business in Maryland. It has no salesman or other employee in Maryland. It does not maintain a mail-order business or accept orders by telephone, as most of the merchandise sold by it requires personal inspection and selection. It has, however, mailed from time to time advertising matter to its customers, including those who reside in Maryland. If merchandise purchased by a resident of Maryland is not taken away by the purchaser, the seller delivers it by its own motor vehicle or by common carrier. As appellant has not been regularly conducting its business in any County of the State or in Baltimore City, within the meaning of Section 348, it could not have followed the statutory procedure. Therefore, appellant was not precluded from challenging the validity of the assessment in the attachment case.

Appellant urged that it was not the intention of the Legislature to put the burden of collecting use taxes upon a foreign corporation which does not engage in any activity in Maryland except delivery of merchandise. It is true that even the solicitation of business in Maryland by an agent of a foreign corporation, without other substantial activities within the State, does not constitute "doing business" in the State within the meaning of the Foreign Corporation Law so as to subject itself to the State forum. Code 1951, art. 23, sec. 88; M. J. Grove Lime Co. vs. Wolfenden, 171 Md. 299, 303, 188 A. 794; Shaughnessy vs. Linguistic Society of America, Md., 84 A. 2d 68, 71. But here we are dealing with a statute which is far broader in its application.

Section 371 of the Act provides: "Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this subtitle, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this subtitle from the purchaser."

Section 368(k) defines the term "engaged in business in this State" as the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State.

In view of this unusually broad definition of "engaged in business," we must hold that the statute is applicable to appellant, because it delivered merchandise to purchasers in Maryland.

We now consider the basic question whether the Maryland use tax infringes Article I, Section 8, of the Constitution of the United States, which vests in Congress the power to regulate commerce with foreign nations and among the several States. This provision of the Constitution was designed by the framers to eliminate the barriers which had been erected by the States to the freedom of movement across State borders. While the Constitution grants to Congress the power to regulate commerce among the States, it does not say what the States can do or cannot do in the absence of Congressional action. It may be generally stated, however, that while the Commerce Clause forbids a State to impose taxes directly on interstate commerce, it does not absolutely prevent the imposition of State taxes which, under certain circumstances, may have some incidental effect upon such commerce. The State cannot use its taxing or police power with the aim and effect of establishing an economic barrier against competition with the products of another State. The importer must be free from taxes which are imposed for the purpose of suppressing competition from outside the State and which lead to the suppression intended. It has been said that no formula can be devised for determining in all cases whether or not

a State tax is prohibited by the Commerce Clause, and that the question is inherently a practical one depending for its decision on the facts of each particular case. J. D. Adams Mfg. Co. vs. Storen, 304 U. S. 307, 58 S. Ct. 913, 9824, 82 L. Ed. 1365, 117 A. L. R. 429.

Taxes on sales of personal property have been upheld by the United States Supreme Court in decisions extending back to 1869, when the Court, speaking through Justice Miller in Woodruff vs. Parham, 8 Wall. 123, 19 L. Ed. 382, held that an ordinance of the City of Mobile, Alabama, authorizing the collection of a tax sales at auction was valid as applied to goods which were products of other States. Since that time the Court has uniformly sustained a tax imposed by the State of the buyer upon a sale of goods effected by delivery to the purchaser upon arrival at destination after an interstate journey. In referring to that ruling, Justice Stone said in McGoldrick vs. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 394, 395, 84 L. Ed. 565: "It has the support of reason and of a due regard for the just balance between national and state power. In sustaining these taxes on sales emphasis was placed on the circumstances that they were not so laid, measured or conditioned as to afford a means of obstruction to the commerce or of discrimination against it, and that the extension of the immunity of the commerce clause contended for would be at the expense of state taxing power by withholding from taxation property and transactions within the state without the gain of any needed protection to interstate commerce."

In Henneford vs. Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814, the Court held that in its application to machinery, materials and supplies purchased at retail in other States by contractors and brought into the State of Washington for use in construction, a State tax of 2 per cent of the purchase price, including the cost of transportation, for the privilege of using any article of tangible personal property within the State was not a tax on the operations of interstate commerce, but a tax on the privilege of use after such commerce was at an end, and therefore did not unlawfully burden interstate commerce. The Court explained that the right to use property is only one of the

privileges making up ownership, and the fact that the tax laid down the use of personal property purchased at retail, either within or without the State, was called an excise did not make the State's power to impose it less under the Commerce Clause than if it had been called a property tax.

In Pacific Telephone & Telegraph Co. vs. Gallagher, 306 U. S. 182, 59 S. Ct. 396, 83 L. Ed. 595, the Court held that a California use tax, imposing an excise on the consumer for the use, storage or consumption in California of tangible personal property purchased from any retailer, did not infringe the Commerce Clause in its application to equipment, materials and supplies purchased outside California by a California corporation operating a telephone and telegraph system in interstate and intrastate commerce and shipped to it in interstate commerce at various points within the State.

In Nelson vs. Sears, Roebuck & Co., 312 U. S. 359, 61 S. Ct. 586, 85 L. Ed. 888, the Court held that where a New York corporation was doing business in Iowa through its retail stores, the fact that a sale by one of its mail-order houses located outside Iowa to a customer within the State was made outside the State did not preclude application of the use tax thereto on the ground that the purchaser employed agencies of interstate commerce to effectuate the purchase.

In Nelson vs. Montgomery Ward & Co., 312 U. S. 373, 61 S. Ct. 593, 85 L. Ed. 897, the Court held that the Iowa Use Tax Act was not unconstitutional as applied to mail-order sales solicited by an Illinois corporation through advertising by its stores in Iowa, although the orders were sent to out-of-State mail-order houses and were filled by shipments to customers in Iowa, since the corporation could not thus escape the tax exacted by Iowa as a price of enjoying benefits flowing from its Iowa business.

In line with these decisions, we hold that the Maryland Use Tax Act, as applied to appellant's sales of furniture delivered to purchasers residing in Maryland, does not unlawfully interfere with interstate commerce. Of course, we recognize that the Commerce Clause prevents the State not only from enacting legislation that constitutes a direct bur-

den on interstate commerce, but also from imposing any heavier burden on products brought into the State from other States than it imposes upon similar products of their own territory. It is well established that a State tax on merchandise brought into the State from another State or upon its sales after it has reached its destination is lawful only when the tax is not discriminatory in its incidence against the merchandise because of its origin in another State. Sonneborn Bros. vs. Cureton, 262 U. S. 506, 43 S. Ct. 643, 646, 67 L. Ed. 1095; Baldwin vs. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497, 502, 79 L. Ed. 1032, 101 A. L. R. 55. However, a use tax statute, as applied to property purchased outside the State and brought into the State by the seller and used therein by the purchaser in conducting its business, is not discriminatory and hence does not offend the Commerce Clause where the tax is not exacted upon any article the sale or use of which has been subjected to a tax equal to or in excess of the challenged tax, whether under the laws of the State imposing the challenged tax or of any other State.

Appellant has failed to show that the Maryland use tax is discriminatory. This tax is complementary to the retail sales tax. Code 1951, art. 81, secs. 320-367. Section 370 of the Use Tax Act specifically exempts from the use tax all personal property upon which a retail sales tax has been paid to the State of Maryland. It is one of the functions of the integrated sales and use taxes to remove the temptation of buyers to place their orders in other States in the effort to escape payment of the tax on local sales. The fact that the buyer employs agencies of interstate commerce to effectuate his purchase is not material, since the tax is imposed on the privilege of use, storage or consumption of property after the commerce is ended. The statute taxes the use, storage or consumption of the property in the State of Maryland, regardless of the time when the tax is required to be paid.

The final contention is that the assessment violates the Due Process Clause of the Fourteenth Amendment of the Federal Constitution and also Article 23 of the Maryland Declaration of Rights, which declares that no man ought

to be "deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land." Appellant, appearing specially in the attachment case for the purpose of quashing the writ of attachment, sought to defend its interest in the attached motor vehicle without subjecting itself to the jurisdiction of the Superior Court.

Attachment proceedings, except those used as execution on judgment, are designed to accomplish two purposes: (1) to compel the appearance of the defendant to answer the plaintiff's demand, and (2) to give the plaintiff a security for the payment of his claim. This security is obtained at the commencement of the action by the seizure of the defendant's property. When the property is validly acquired, it is retained to await the result of the action, unless the defendant appears to the suit in the meantime and displaces the lien acquired under the attachment by substituting the security of a bond. If the defendant in a nonresident attachment suit appears, the proper course is to try the short note case against him before trying the attachment case. After the defendant has appeared and a verdict has been rendered in favor of the plaintiff in the short note case, the entry of a judgment *in personam* will not be arrested on account of the existence of any ground for quashing the attachment. Philbin vs. Thurn, 103 Md. 342, 63 A. 571.

Nevertheless, it is permissible for a defendant whose property has been attached to appear in the action solely for the purpose of protecting his property and without subjecting himself personally to the jurisdiction of the court, even though in order to protect his property he contests the validity of the plaintiff's claim. In such a case the court has jurisdiction over the property attached, but does not have jurisdiction over the person of the defendant. In support of this rule, the American Law Institute states: "If the court thereby acquires jurisdiction over him personally, in spite of his protestation that he does not intend to submit himself personally to the jurisdiction of the court, he has been placed in a difficult dilemma. He has been compelled either to lose his property, even though the claim against him is unfounded, or to submit himself personally

to the jurisdiction of the court which otherwise could have no power over him." Restatement Judgments, sec. 40.

But even acknowledging that appellant, a foreign corporation, was not subject to the State's jurisdiction, we hold that appellant may be held liable for the collection of the use tax from its Maryland customers. Appellant relied on two Mississippi decisions, Reichman-Crosby Co. vs. Stone, 204 Miss. 122, 37 So. 2d 22, and Stone vs. Reichman-Crosby Co., 43 So. 2d 184, holding that a nonresident seller engaged in interstate commerce is not subject to the State's jurisdiction and taxing power so as to be personally liable for failure to collect and pay a tax levied against citizens of Mississippi. We follow the decisions of the United States Supreme Court, rather than the Mississippi decisions.

In Felt & Tarrant Mfg. Co. vs. Gallagher, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488, the Court held that the California Use Tax Act requiring retailers to collect the use tax from purchasers did not violate the Due Process Clause of the Fourteenth Amendment as applied to appellant, an Illinois corporation, which did not carry on any intrastate operations in California and was not subject to its jurisdiction, as against the argument that California lacked the power to require it to act as the State's collecting agent for the use tax and to insure payment of the tax if it failed to make collections from the tax debtors. Again in Southern Pacific Co. vs. Gallagher, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586, the Court held that the California use tax, as applied to tangible personal property purchased outside the State by the railroad company and installed on importation or kept available for use as part of the transportation facilities, was not invalid as violating the Due Process Clause, since the taxable event was the exercise of property rights in California.

In General Trading Co. vs. State Tax Commission of Iowa, 322 U. S. 335, 64 S. Ct. 1028, 1029, 1030, 88 L. Ed. 1309, where a Minnesota seller had no office, branch, warehouse, or general agent in Iowa, but shipped goods from Minnesota to purchasers in Iowa, Justice Jackson, dissenting, said: "So we are holding that a state has power to make a tax collector of one whom it has no power to tax. Certainly no state has a constitutional warrant for making a tax col-

lector of one as the price of the privilege of doing interstate commerce. * * * The power of Iowa to enforce collection in other states is certainly very limited and the effort to do so on any wide scale is unlikely either to be systematically pursued or successfully executed."

While it may be true that the tax can be easily evaded, nevertheless the Court, speaking through Justice Frankfurter, said: "The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device."

As we find no valid objection to the assessment, we affirm the judgment entered in the short note case in favor of the State and also the order in the attachment case denying appellant's petition to quash the attachment.

Judgment affirmed, with costs.

Order affirmed, with costs.

APPENDIX "B" *

Excerpts From Article 81 of the Annotated Code of Maryland (1951), Entitled "Revenue and Taxes", Sub-title "Maryland Use Tax".

"368. [*308*] (Definitions) As used in this sub-title, the following terms shall mean or include:

* * * * * * *

"(k) 'Engaged in business in this State' means the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State. This term shall include, but shall not be limited to the following acts or methods of transacting business.

"(1) The maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a sub-

* The italicized section numbers in brackets are those of the 1947 Cumulative Supplement to the 1939 Code.

sidiary or agent, by whatever name called, of any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

"(2) The having of any representative, agent, salesman, canvasser, or solicitor operating in this State for the purpose of selling, delivering, or the taking of orders for any tangible personal property."

* * * * * * *

"369. [*309*] (Imposition of tax). An excise tax is hereby levied and imposed on the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State on or after the effective date of this Act, for use, storage or consumption within this State. The tax imposed by this section shall be paid by the purchaser and shall be computed as follows:

"(a) On each sale where the price is from fifty-one cents (51¢) to one Dollar ($1), both inclusive, two cents (2¢).

"(b) On each fifty cents (50¢) of price or fraction thereof in excess of One Dollar ($1), one cent (1¢)."

"Collection of Tax"

"371. [*311*] Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this sub-title, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser."

"373. [*313*] Every vendor required or permitted to collect the tax shall collect the tax imposed by the provision of this sub-title, notwithstanding the following:

"(a) That the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the vendor at a point outside of this State as a result of solicitation by the vendor through the medium of a catalog or other written advertisement; or

"(b) That the purchaser's order or contract of sale made or closed by acceptance or approval outside of this State

or before said tangible personal property enters this State; or

"(c) That the purchaser's order or contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this State and shipped directly to the purchaser from the point of origin; or

"(d) That said property is mailed to the purchaser in this State from a point outside this State or delivered to a carrier at a point outside this State, F. O. B., or otherwise, and directed to the vendor in this State, regardless of whether the cost of transportation is paid by the vendor or by the purchaser; or

"(e) That said property is delivered directly to the purchaser at a point outside this State, if it is intended to be brought to this State for use, storage or consumption in this State."

"374. [*314*] The tax to be collected as provided in this sub-title shall be stated and charged separately from the sale price and shown separately from the sale price on any record thereof at the time when the sale is made or at the time when evidence of the sale is issued or employed by the vendor. The tax shall be paid by the purchaser to the vendor, as trustee for and on account of the State, and the vendor shall be liable for the collection thereof for and on account of the State."

"375. [*315*] The vendor and any other officer of any corporate vendor required or permitted to collect the tax imposed by this sub-title shall be personally liable for the tax collected, and such vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property and payable at the time of the sale. Any vendor who fails to collect the tax pursuant to this sub-title and the regulations prescribed hereunder shall, in addition to all other penalties, be personally liable to the State for the amount uncollected."

"376. [*316*] The tax hereby imposed shall apply and be collected by the vendor required or permitted to collect the tax imposed by this sub-title from the purchaser at the time the sale is made regardless of the time when the purchase

price is paid and delivered; unless the Comptroller shall provide by regulation in the case of credit or installment sales for the payment of the tax upon collection of the price or installments of the price or at some other time."

"379. [*319*] For the purpose of the proper administration of this sub-title and to prevent evasion of the tax and the duty to pay the same as herein imposed, it shall be presumed that the tangible personal property sold by any person for delivery in this State, however made or carried, is sold for use, storage or consumption in this State. A like presumption shall apply to all tangible personal property delivered without this State and brought into his State by the purchaser thereof. The presumption contained in this section may be overcome if the purchaser shall have in his possession a certificate, in such form as the Comptroller may prescribe, evidencing the fact that the tangible personal property was not sold for use, storage or consumption in his State as those terms are defined in Section 368 of this sub-title."

"Returns and Payment of Tax"

"380. [*320*] Before the fifteenth day of August, 1947, and before the fifteenth day of each calendar month thereafter, every vendor engaging in business in this State and every vendor not engaging in business in this State but who, upon application to the Comptroller, has been expressly authorized to collect the tax, shall make a return to the Comptroller, covering the preceding calendar month. The Comptroller may permit or require such returns to be made for other periods and upon such other dates as he may by regulation specify."

"381. [*321*] The form of returns required to be filed by Section 380 of this sub-title shall be prescribed by the Comptroller and shall contain such information as he may deem necessary for the proper administration of the tax. Such returns shall show, among other things the aggregate value of the tangible personal property sold by the vendor, the use, storage or consumption of which became subject to the tax imposed by this sub-title during the period of time covered by the return."

"382. [*322*] Before the fifteenth day of August, 1947, and before the fifteenth day of each calendar month there-

after, every person purchasing tangible personal property, the use, storage or consumption of which is subject to the tax imposed by this sub-title, and who has not paid the tax imposed by this sub-title to a vendor required or authorized to collect the same, shall make a return to the Comptroller covering the preceding calendar month. The Comptroller may permit or require such returns to be made for other periods and upon such other dates as he may by regulation specify. Such returns shall show the value of the tangible personal property purchased by such person, the use, storage or consumption of which became subject to the tax imposed by this sub-title during the period of time covered by the return."

"383. [*323*] At the time of filing the returns as specified in Section 380 and 382 of this sub-title, the vendor or person so filing said returns shall pay to the Comptroller the taxes imposed by Section 369 of this sub-title."

"384. [*324*] The vendor or person subject to tax as provided in this sub-title shall be entitled to apply and credit against the amount of tax payable by him as stated in Section 383, an amount equal to three per cent (3%) of the gross tax to be remitted to the Comptroller to cover the expense in the collection and remittance of said tax; provided, however, that nothing contained in this section shall apply to any vendor or person who shall fail or refuse to file his return with the Comptroller within the time prescribed by Sections 380 and 382 of this sub-title."

"386. [*327*] Where the Comptroller, in his discretion, deems it necessary to protect the revenues to be obtained under the provisions of this sub-title, he may require any taxpayer [to] file with him a bond issued by a surety company authorized to do business in this State and approved by the State Insurance Commissioner as to solvency and responsibility, in such amounts as the Comptroller may fix to secure the payment of any tax or penalties due or which may become due from such taxpayer. In the event that the Comptroller determines that a taxpayer is to file such a bond, he shall give notice to such taxpayer to that effect, specifying the amount of the bond required. The taxpayer shall file such bond within five (5) days after the giving of such notice unless within such five (5) days after the re-

quest in writing a hearing before the Comptroller, at which hearing the necessity, propriety and amount of the bond shall be determined by the Comptroller. Such determination by the Comptroller shall be final and shall be complied with within fifteen (15) days after the taxpayer is given notice thereof."

"Registration"

"390. [*331*] Every vendor engaged in business in this State except those registered under Section 356 of this Article, who shall sell or deliver tangible personal property for use, storage or consumption in this State shall obtain a license for the privilege of engaging in said business. Such person shall apply for the license required by this section within sixty (60) days from and after July 1, 1947."

"391. [*332*] Each applicant for a license required by Section 390 of this sub-title shall on or before the first day of August, 1947, make out and deliver to the Comptroller, upon a blank to be furnished by him for that purpose, a statement showing the name of the applicant, the name and addresses of all agents of the applicant operating within this State, the location of any and all distribution houses or other places of business of the applicant in this State, and such other information as the Comptroller may prescribe."

"392. [*333*] At the time of making his application as required by Section 391 of this sub-title, the applicant shall pay to the Comptroller a license fee in the sum of One Dollar ($1). Upon receipt of such application and the fee as herein prescribed, the Comptroller shall issue to the applicant a license authorizing the applicant to sell or deliver tangible personal property for use, storage, or consumption in this State. The license shall be non-transferrable except as otherwise provided in this sub-title and shall be displayed in the applicant's place of business. Except as otherwise provided in this sub-title, the license issued as herein provided shall continue valid until surrendered by the vendor or cancelled for cause by the Comptroller. The form of such license shall be as prescribed by the Comptroller."

"393. [*334*] Whoever engages in business in this State, except those registered under Section 355 of this Article,

who shall sell or deliver tangible personal property for use, storage or consumption in this State without having a license as provided in Section 390 of this sub-title shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than Twenty-five Dollars ($25.00) nor more than One Hundred Dollars ($100.00)."

"Applicability of Other Sections"

"394. [*335*] All provisions not inconsistent with the provisions of this sub-title in Sections 340 and 341 of this Article relating to failure to file returns and incorrect returns; in Sections 343-346, both inclusive, of this Article relating to refunds; in Sections 347 and 348 of this Article relating to revisions and * repeals; in Sections 353-355, both inclusive, of this Article relating to records, investigations and hearings; in Section 361 of this Article relating to general powers of the Comptroller; in Sections 363-364, both inclusive, relating to general provisions; in Section 365 of this Article relating to penalties; and in Section 366 of this Article relating to disposition of proceeds are hereby made a part of this sub-title and shall be applicable hereto."

Excerpts from Article 81 of the Annotated Code of Maryland (1951), entitled "Revenue and Taxes", sub-title "Retail Sales Tax Act".

"Failure to File Returns: Incorrect Returns"

"340. [*280*] (a) Whenever a taxpayer fails to file any return and/or pay the tax when due as required by this sub-title, there shall be assessed against him a penalty of ten percent (10%) of the tax due, plus interest at the rate of one-half of one percent (½ of 1%) per month or fraction of a month from the time the tax was due until paid.

"(b) If the failure to file any return is due to an attempt to defraud, then the penalty shall be, in lieu of the penalty more specifically provided for by sub-section (a) of this section, one hundred percent (100%) of the tax due, plus interest at the rate of one percent (1%) per month or fraction of a month from the time the tax was due until paid.

---

* The word "appeals" evidently intended.

"(c) Any taxpayer who fails to file proper returns and pay the tax due with penalty and interest within ten (10) days of receiving notice from the Comptroller advising him of his delinquency, shall in addition to the foregoing penalty be assessed a penalty of twenty-five percent (25%) of the tax due.

"(d) When both vendor and purchaser are liable for any tax, a deficiency assessment shall be first levied against the vendor, but such assessment shall not be considered an election of remedies nor bar an assessment against the purchaser for the same tax or part thereof unpaid by the vendor.

"(e) All amounts received from any taxpayer shall be credited first to penalty and interest accrued and then to the tax due."

"Records; Investigations and Hearings"

"353. [*293*] (a) Each vendor shall keep complete and accurate records of all taxable sales, together with a record of the tax collected thereon, and shall keep all invoices, bills of lading and such other pertinent records and documents in such form as the Comptroller may, by regulation, require. Such records and other documents shall be open at any time during business hours for inspection and examination by the Comptroller or any of his authorized representatives and shall be preserved for a period of three (3) years unless the Comptroller shall in writing consent to their destruction within that period or by order require that they be kept longer.

"(b) Whenever any taxpayer fails to keep records from which the tax imposed by this subtitle may be accurately computed, the Comptroller may make use of a factor developed by surveying other taxpayers of the same type or otherwise compute the amount of tax due and this computation shall be prima facie correct."

"354. [*294*] (a) For the purpose of enforcing the provisions of this sub-title the Comptroller or any duly authorized agent or representative designated by him:

"(1) May conduct investigations and hold hearings concerning any matter covered by this sub-title at any time or place within the State of Maryland;

"(2) In the conduct of any investigation or hearing, may require by subpoena or summons the attendance and testimony of witnesses and the production of any books, accounts, records, papers and correspondence relating to any matter, which the Comptroller is authorized by this subtitle to determine;

"(3) May sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence.

"(b) In case of disobedience of any subpoena or the contumacy of any witness appearing before the Comptroller or his duly authorized agent or representative, the Comptroller may apply to the Circuit Court of any of the counties or to the Baltimore City Court for an Order. Such Court may thereupon issue an Order requiring the person subpoenaed to obey the subpoena or to give evidence or produce books, accounts, records, papers and correspondence touching the matter in question. Any failure to obey such order of Court, may be punished by such Court as a contempt thereof."

"Penalties"

"365. [*305*] Any taxpayer or any officer of a corporate taxpayer

"(a) who wilfully fails to collect the tax imposed by this sub-title in accordance herewith; or

"(b) who wilfully fails to pay over the tax imposed by this sub-title in accordance herewith; or

"(c) who wilfully fails to file any return required by this sub-title; or

"(d) who makes any wilfully false statement or misleading omission in any return pursuant to this sub-title; or

"(e) who wilfully fails to keep records in accordance with this sub-title and any regulations of the Comptroller pursuant hereto, shall be guilty of a misdemeanor and upon conviction shall be fined not more than One Thousand Dollars ($1,000.00) or imprisonment for not more than one year, or both."

BLURRED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

JAMES PIPER,
WILLIAM L. MARBURY,
WILLIAM POOLE,
JAMES L. LATCHUM,
Counsel for Appellant.

BLEED THROUGH

INDEX

Table of Contents

Table of Citations

Table of Cases

Constitution and Statutes

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

With its statement in opposition to appellant's Statement as to Jurisdiction, appellee has filed a motion to dismiss or affirm. Pursuant to Rule 7, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellant files this brief in opposition to appellee's motion. In doing so, appellant will confine itself to points not covered in its Statement as to Jurisdiction.

I.

STATEMENT OF ISSUES ON APPEAL

(1) Appellee contends that the only issue in the case is as to the power of the State of Maryland to impose on appellant "the duty of collection of its use tax". This confuses the real issue. The statute, the validity of which was drawn in question in the proceedings below, specifically provides that the vendor shall (in addition to all other penalties) be personally liable to the State for the use tax on all property sold by the vendor which is used in the State of Maryland, *whether the tax has been collected or not.* (Annotated Code of Maryland, Art. 81, Sec. 375, quoted in full in Appendix B of appellant's Statement as to Jurisdiction (R. pp. 105-106)). Moreover, the statute requires the vendor at the time of filing its return, to "pay to the Comptroller the taxes imposed by Section 369 of this sub-title" (Annotated Code of Maryland, Art. 81, Sec. 383, quoted in full in Appendix B of appellant's Statement as to Jurisdiction (R. p. 107)). As we have pointed out in our Statement as to Jurisdiction, the original complaint in this case shows that it is a suit to collect a tax from appellant, not merely a proceeding to enforce a duty of collection.

(2) In stating the issues appellee refers to appellant as having its "principal place of business" in Wilmington, Delaware. The record is clear that appellant has no other place of business.

(3) In listing appellant's contacts with the State of Maryland, appellee refers to "radio broadcast to Maryland residents". The record is clear that appellant has engaged in no broadcasting anywhere in the State of Maryland nor has it ever addressed any broadcast to residents of Maryland. True, appellant has used broadcasting facilities of a

station located in Wilmington, Delaware. No doubt the electronic impulses may occasionally have crossed over into Maryland although the record is silent as to this. In any event it would hardly seem appropriate to describe this activity of appellant as a "contact" with the State of Maryland. Perhaps for this reason radio broadcasting was not even mentioned in the opinion of the Court of Appeals.

II.

THE COMMERCE CLAUSE

Appellee argues that since the impact on interstate commerce of the Maryland Use Tax is identical whether the tax is collected from a non-resident vendor or from a Maryland purchaser, it should make no difference that the vendor is completely unconnected with the State of Maryland. This is the familiar argument by which taxing authorities have repeatedly attempted to sustain other direct levies on interstate commerce. This Court has always emphatically rejected these arguments. Recent illustrations may be found in cases of *McLeod v. Dilworth*, 322 U. S. 327 (1944); *Freeman v. Hewit*, 329 U. S. 249 (1946); *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951); and *Memphis Steam Laundry v. Stone*, 342 U. S. 389 (1952).

Appellee also argues that since appellant is entitled by the statute (Annotated Code of Maryland, Art. 81, Sec. 384) to withhold 3% of the tax to cover the expense of collection and remittance, the case is governed by the decision of this Court in *Colorado National Bank of Denver v. Bedford*, 310 U. S. 41 (1940). That case added nothing to the law established in *First National Bank v. Kentucky*, 9 Wall. 353 (1870). Both cases involved statutes which made national banks liable for taxes owed by somebody else; in the *Bedford* case, by the holders of safe deposit boxes, in the

Kentucky case, by holders of the company's capital stock. To the argument advanced in the *Kentucky* case that such an imposition on a national bank fell afoul of the doctrine of *McCulloch v. Maryland*, 4 Wheat. 316 (1819), Mr. Justice MILLER replied as follows (p. 362):

> "* * * The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal Government authorizes the tax."

Nothing in the bank cases can have any bearing on the questions presented by the present appeal. Appellant's objection to paying the Maryland Use Tax is not based on its onerous effect but on its invalidity as a direct tax on interstate commerce. In such case, the amount of the tax is immaterial. *Spector Motor Service v. O'Connor, supra.* "Of course, a State tax on interstate commerce does not become a valid one merely because 'it's only a little one' ". Per FRANKFURTER, J., in Memphis Natural Gas Co. v. Stone, 335 U. S. 80 (1948) at p. 104.

III.

THE DUE PROCESS CLAUSE

Appellee apparently admits that it would be stretching the doctrine of the decided cases to hold appellant liable on all sales made to Maryland residents for use in that State. To attach so heavy a burden to such tenuous "contacts" as this record shows appellant to have with the State of Maryland is more than even appellee seems prepared to justify. For this reason appellee seeks to go outside the record so as to bring before this Court the supposed fact that the taxes for which appellant has been sued in this case arise entirely out of transactions where use in Maryland was in contemplation at the time of the sale.

Even if the record gave support to this supposition (which it does not), it would still be true that in no case has this Court sustained a tax under such circumstances. As appellant's Statement as to Jurisdiction clearly shows, this Court has never upheld imposition of a use tax on a vendor unless the vendor was engaged in substantial local activity related to the taxed transaction. Here no such relationship is shown. *Cf. Norton Co. v. Department of Revenue,* 340 U. S. 534 (1951). Granted that taxes, the ultimate incidence

of which falls on the purchaser, may be sustained on lesser contacts than those needed to uphold occupation taxes which fall directly on the vendor, neither sales nor use taxes can be upheld unless some substantial contact exists. *McLeod v. Dilworth,* 322 U. S. 327 (1944) makes this plain.

CONCLUSION

The questions presented are novel and important. Their decision is anxiously awaited by merchants and taxing authorities throughout the country. See *American Bar Association Journal* for June, 1953, Vol. 39, p. 449.

Respectfully submitted,

JAMES PIPER,
WILLIAM L. MARBURY,
WILLIAM POOLE,
JAMES L. LATCHUM,
Counsel for Appellant.

July 2, 1953

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR APPELLANT

JAMES PIPER,
WILLIAM L. MARBURY,
WILLIAM POOLE,
JAMES L. LATCHUM,
Counsel for Appellant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR APPELLANT

Opinions Below

The opinion of the Court of Appeals of Maryland has not been officially reported. It is printed in the Record (R. 35-44) and reported in 95 A. 2d 286 (1953). The opinion of the Superior Court of Baltimore City has not been officially reported. It is printed in the Record (R. 15-33).

Jurisdiction

The judgment of the Court of Appeals of Maryland was entered on March 11, 1953 (R. 45). The petition for appeal was presented to the Chief Judge of that court on June 4, 1953 (R. 45-46). This court noted probable jurisdiction by

order entered October 12, 1953 (R. 51). The appellant by its pleadings filed in the trial court, by its counsel's oral argument in the trial court and memorandum of law filed therein, and by its appeal papers and brief filed in the Court of Appeals of Maryland and oral argument of its counsel therein, in each and every instance, drew in question the validity of a statute of the State of Maryland on the ground of its being repugnant to the Constitution of the United States, as applied to sales made by appellant. The Court of Appeals decided in favor of the validity of the statute in its application to all sales made by appellant to its Maryland customers. This was a final judgment rendered by the highest court of the State of Maryland. Jurisdiction of this Court to review the judgment on appeal is conferred by 62 Stat. 929, 28 U. S. C. Section 1257 (2). *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921).

The Question Presented

May the State of Maryland by attaching a motor vehicle found within its borders, compel a Delaware merchant to pay a use tax on all goods sold by it to purchasers residing in Maryland where the merchant's only contacts with Maryland are in (1) advertising in Delaware newspapers and over Delaware radio and television broadcasting stations; (2) using the United States mails to transmit advertising matter to its customers; and (3) occasionally using Maryland highways to make deliveries to customers who reside there.

Statutes Involved

The claim asserted by the State against appellant is based upon the Maryland Use Tax Act (Chapter 681 of the Acts of 1947, as amended). This statute has been codi-

fied as Sections 368-396, inclusive, of Article 81 of the Annotated Code of Maryland (1951 ed.). It incorporates by reference a number of the provisions of the Retail Sales Tax Act (Chapter 281 of the Acts of 1947, as amended) which has been codified as Sections 320-367, inclusive, of Article 81 of the Annotated Code of Maryland (1951 ed.). The statutes pertinent to this appeal are set forth in an appendix hereto.

Statement Of The Case

Appellant, Miller Brothers Company, is a Delaware corporation (R. 10). It has never qualified or registered to do business in Maryland and has no resident agent in that state (R. 14). It is engaged in the retail household furniture business (R. 10). It has only one store, which is located in Wilmington, Delaware (R. 10). It does not maintain any office, branch store, warehouse or other place of business in Maryland (R. 14). It has no salesman or other employee in Maryland (R. 14).

Appellant advertises regularly in daily newspapers published in Wilmington, Delaware, which circulate in some portions of Maryland. It also advertises by radio and television over broadcasting stations located in Wilmington, Delaware. None of appellant's advertising was designed to appeal to out of state business or to Maryland residents, as such (R. 11).

Appellant distributes, by an automatic card mailing system, about four pieces of advertising matter a year. By the very nature of such automatic mailing, these are mailed to everyone who has purchased from appellant and whose name and address are on appellant's records. Although Maryland residents do receive such mailing pieces, no advertising copy is mailed for the specific purpose of attract-

ing Maryland buyers. Appellant has not sent any advertising copy to Maryland buyers alone, and the only advertising copy which these Maryland buyers receive is that which is sent to all customers whose names and addresses are on the records of appellant (R. 11-12).

Most of the merchandise sold by appellant requires personal inspection and selection (R. 12). Appellant maintains no mail-order business and does not accept orders by telephone (R. 12). In all cases the purchaser (whether a Maryland or a Delaware resident) goes to appellant's store in Wilmington, Delaware, and there selects the items which he desires to purchase (R. 12). Deliveries to Maryland purchasers are made in one of the following three ways and no other (R. 12-13):

(1) The article is taken away by the purchaser.

(2) Appellant delivers the article in Wilmington, Delaware, to a common carrier which delivers the article in Maryland to the purchaser. The cost of delivery is borne solely by appellant.

(3) The article is delivered in Maryland to the purchaser, in a motor vehicle owned and operated by appellant, directly from appellant's store, storeroom or warehouse in Wilmington, Delaware, to the residence of the Maryland purchaser. The cost of delivery is borne solely by appellant.

The Proceedings Below

On or about March 10, 1952, the Comptroller of the State of Maryland assessed a deficiency in use tax against appellant in the amount of $356.40. This assessment included use taxes together with interest and penalty alleged to be due on all sales made during the period July 1, 1947, through December 31, 1951, to persons residing in Mary-

land who had used, consumed or stored or would use, consume or store the purchased property in the State of Maryland (R. 12). Sales in which the purchaser took delivery in Delaware were included among those on which the use tax was claimed. Also included were sales where delivery was made in Maryland by common carrier or in appellant's own trucks (R. 12-14).

Appellant, through its counsel, having advised the Comptroller that the Company intended to ignore the assessment, on March 19, 1952, the State of Maryland (appellee here and in the Court of Appeals of Maryland) filed an attachment proceeding in the Superior Court of Baltimore City alleging that appellant was indebted to it by reason of its "failure and refusal to pay legally assessed deficiencies to the said State of Maryland, in Use Taxes justly due and owing, in the full and just sum of Three Hundred Fifty-six Dollars and Forty cents ($356.40)" (R. 1). The court thereupon issued a writ of attachment directing the sheriff of Baltimore City to attach any property of appellant which could be found in the jurisdiction (R. 4-6). The sheriff's return on this writ shows that on April 4, 1952, he seized a station wagon bearing Delaware License No. C 4749 which he appraised at a value of $800 (R. 7).

On March 19, 1952, the same day the attachment proceeding was filed, and in connection with the attachment proceeding, the State of Maryland filed a suit (called in Maryland parlance "the short note case") against appellant in the Superior Court of Baltimore City, Maryland, to recover taxes, interest and penalty alleged to be due in the amount of $356.40 (R. 2). The sheriff of Baltimore City was directed to summon the appellant to appear on a day named in the writ of summons (R. 3-4). The sheriff's return on the writ of summons shows that the appellant was not found within the State of Maryland (R. 4).

Thereafter appellant appeared specially in the attachment proceeding solely for the purpose of protecting its interest in the property attached and petitioned the court to quash the writ of attachment for the following reasons:

> "(a) The use tax which the Plaintiff claims is due and owing by the Defendant to the Plaintiff consists of use taxes which Plaintiff claims the Defendant was required, by the Maryland Use Tax Law [Sections 308 to 337* inclusive of Article 81 of the Annotated Code of Maryland, 1947 Cumulative Supplement (as amended)] to collect and pay to the Plaintiff on sales of certain tangible personal property made by the Defendant in the State of Delaware to Maryland purchasers. The Defendant has not engaged nor does it engage in any local activities in the State of Maryland which could be the basis for such a requirement. If the Maryland Use Tax Law be construed to require the Defendant to make said collections and payments, said Law is void because it violates (i) the due process clause of the Fourteenth Amendment to the Constitution of the United States of America, (ii) Article 23 of the Declaration of Rights of the Constitution of Maryland, and (iii) Section 8 (Commerce Clause) of Article I of the Constitution of the United States of America.
>
> "(b) That the Maryland Use Tax Law cannot properly be construed to require the Defendant to make said collections and payments". (R. 7-8).

The State of Maryland then moved to dismiss appellant's petition on the grounds (1) that collection of sales and use taxes could be contested only by following certain administrative and court proceedings prescribed by the sales

---

* These sections were renumbered as section 368-396, inclusive, in the 1951 Edition of the Annotated Code of Maryland, which was published after the trial of this case in the Superior Court of Baltimore City but before the case was heard on appeal in the Court of Appeals of Maryland. Except as specifically noted, the numbering of the 1951 Edition will be used throughout this Brief.

and use tax laws, and (2) that the assessment, collection and payment of the tax involved were authorized and required by Sections 368 through 396, inclusive, of Article 81 of the Annotated Code of Maryland and such authorization and requirement did not violate any provision of the Constitution of the United States of America or the Constitution of the State of Maryland (R. 9-10).

Pursuant to a stipulation (R. 15) signed by counsel for both appellant and the State of Maryland, appellant's petition was considered as having been refiled as a plea in bar in the short note case by appellant appearing specially and solely for the purpose of defending its interest in the property attached, and the case then proceeded to hearing on the issues raised by the State's request for dismissal of the petition to quash the writ of attachment and by its request for judgment against the appellant in the short note case and for a final judgment of condemnation against the station wagon attached, and by the appellant's petition to quash the writ of attachment and its plea in bar which made the same contentions as the petition. These contentions are quoted above and will not be restated.

An agreed statement was presented to the court setting forth the facts stated above (R. 10-14). After hearing argument the court denied appellant's petition to quash the writ of attachment and signed an order entering judgment against the appellant in the short note case for $363.00 with interest and costs, this being the full amount of the tax alleged to be due in connection with all of the transactions described in the agreed statement of facts (R. 33-34).

In his opinion, the trial judge (WARNKEN, J.) held (1) that the appellant had the right to defend this suit by raising the constitutional questions stated in its petition to quash the attachment above mentioned and overruled the

contention of the State that the appellant should first have resorted to administrative remedies (R. 22); (2) that the appellant was engaged in business in the State of Maryland and could be required to collect and be made liable to the State of Maryland for the use tax on tangible personal property which it delivered in Maryland by its own trucks or by common carrier (R. 32); (3) that the State of Maryland had "no jurisdiction" to require appellant to collect or be liable for the use tax on tangible personal property purchased by Maryland residents in Delaware and personally brought by such residents into Maryland (R. 32); and (4) that since the tax was valid as to some transactions, the Comptroller of the State of Maryland had the legal right to make a deficiency assessment against it and the amount of the assessment could be attacked only by pursuing the administrative and court proceedings made available by the Maryland statutes (R. 33). Accordingly, the assessment against the appellant on all sales was upheld (R. 33).

Appellant filed two appeals in the Court of Appeals of Maryland. One appeal was from the order of the court denying appellant's petition to quash and set aside the writ of attachment (R. 35). The other appeal was from the judgment entered against appellant in the short note case (R. 34). The Court of Appeals affirmed both the judgment and the order by a final order entered on March 11, 1953 (R. 45). In its opinion, the court dealt first with the contention of the State that appellant, by failing to follow the statutory administrative procedure, lost all right to attack the assessment. This contention was overruled, the court holding that the statutory procedures were inapplicable. In this connection the court said (R. 38):

> "As appellant has not been regularly conducting its business in any County of the State or in Baltimore City, within the meaning of Section 348, it could not

have followed the statutory procedure. Therefore, appellant was not precluded from challenging the validity of the assessment in the attachment case."

The Court of Appeals also held that appellant had the right to appear specially in such an attachment proceeding solely for the purpose of protecting its interest in the property attached and without subjecting itself personally to the jurisdiction of the court even though in order to protect its property it contested the validity of the State's claim (R. 43).

The Court of Appeals also dealt with appellant's contention that it was not subject to the provisions of the Maryland statute. The court held that while the appellant had not been "regularly conducting its business in any county of the State or in Baltimore City" and was not doing business in the State "within the meaning of the Foreign Corporation Law so as to subject itself to the State forum", it was nevertheless "engaged in business in this State" within the meaning of the Maryland Use Tax Law (R. 38).

The court then held that, "even acknowledging that appellant, a foreign corporation, was not subject to the State's jurisdiction," (R. 43) the assessment of the tax against appellant did not infringe Article I, Section 8, of the Constitution of the United States vesting in Congress the power to regulate commerce with foreign nations and among the several states nor violate the Due Process Clause of the Fourteenth Amendment of the Federal Constitution nor Article 23 of the Maryland Declaration of Rights which declares that "no man ought to be deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land." Finding that there was no valid objection to the assessment, the court affirmed the judgment entered in the short note case in favor of the State and also the

order in the attachment case denying appellant's petition to quash the attachment (R. 45).

In affirming the judgment the Court of Appeals necessarily held (contrary to the opinion of the trial court) that the State could validly assess against appellant use taxes payable by Maryland customers who bought goods from the appellant in Delaware, took delivery there and thereafter themselves brought the goods into the State of Maryland. In the trial court the assessment had been held invalid to the extent that such cases were included but judgment had been entered against the appellant nevertheless because of failure to pursue appropriate administrative remedies. The Court of Appeals did not base its affirmance on this ground — in fact it specifically held that the administrative remedies were not available to the appellant (R. 38) — but rather on the ground that the assessment was in all respects valid and lawful.

Preliminary Statement

Section 383 of the Annotated Code of Maryland* requires the vendor at the time of filing his return to "pay to the Comptroller the taxes imposed by Section 369 of this subtitle." Section 375 provides that: "Any vendor who fails to collect the tax pursuant to this sub-title and the regulations prescribed hereunder shall, in addition to all other penalties, be personally liable to the State for the amount uncollected." Section 340 (d) provides that: "When both vendor and purchaser are liable for any tax, a deficiency assessment shall be first levied against the vendor".

The suit which gives rise to this appeal is one to recover from appellant a sum of money due and owing by virtue of the fact that "the Comptroller has assessed a deficiency

* All statutes cited appear in the Appendix hereto (*infra* pp. 31-41).

in Use Tax against the Defendant [appellant] herein in the amount of $356.40 which said deficiency has become final" (R. 2). The affidavit of attachment recites that appellant "is justly and bona fide indebted unto the said State of Maryland, by reason of their failure and refusal to pay legally assessed deficiencies to the said State of Maryland, in Use Taxes justly due and owing" (R. 1). The judgment of the Superior Court of Baltimore City was entered against appellant in the full amount of the tax claimed (R. 33).

Thus the issue involved in this case is plainly one of jurisdiction to impose a tax. That issue cannot be obscured by euphemistic declarations that Maryland seeks only to impose upon appellant the duty of tax collection. If the judgment of the lower courts is affirmed, appellant will have to pay a tax imposed upon it by the State of Maryland. If the State lacks power to impose such a tax this appeal must succeed.

In *General Trading Company v. State Tax Commission*, 322 U. S. 335 (1944), this Court had before it a ruling of the Supreme Court of Iowa requiring a foreign corporation to pay a use tax on goods shipped into that state and used there by Iowa residents. In that case it appeared that the seller was engaged in the systematic solicitation of orders through salesmen who made personal calls in Iowa on prospective customers and that the property on which the use tax was laid was sent to Iowa as a result of orders so solicited. The seller voluntarily submitted to the jurisdiction of the Iowa courts and sought to challenge the application to it of the Iowa use tax statute. The Supreme Court of Iowa held that the statute applied. This court affirmed. Speaking for the majority, Mr. Justice FRANKFURTER held that Iowa might properly impose a tax on the

resident purchaser of property brought into the State even though the property came into the purchaser's possession as a result of interstate commerce. The fact that it was the non-resident seller from which Iowa was seeking to collect the tax was met with the simple assertion that "To make the distributor the tax collector for the State is a familiar and sanctioned device." (322 U. S. at 338).

This opinion left much doubt as to the scope of the court's ruling. Was the fact that the seller voluntarily submitted to the jurisdiction of the Iowa court significant? Was the continuous solicitation by salesmen in Iowa an essential factor in the court's decision? Did the court mean to say that Iowa might impose the burden of collecting the tax on transactions where no solicitation had taken place in Iowa? These and other questions remained unanswered by the opinion. See comment of Thomas Reed Powell, 57 HARV. L. R. 1086 (1944).

The taxing authorities of the various states have naturally attempted to give the broadest application to the doctrine of the *General Trading* case. See 65 HARV. L. R. 301 (1951). But this attitude on their part has met with stout resistance. Sellers whose products are sold direct to purchasers residing in many different states have been appalled at the prospect of maintaining records to fit a variety of State regulations and of submitting to inspection by a multiplicity of different taxing officials. Many of them have simply ignored all communications from out of state sales tax divisions and have gone about their business as before. JACOBY, *Retail Sales Taxation* (1938); HAIG & SHOUP, *The Sales Tax in the American States* (1934). The present case is an attempt by the taxing officials of the State of Maryland to break this impasse by seizing property of a non-resident seller — in this case a motor vehicle bear-

ing a Delaware license which happened to be found in Maryland.

Appellant submits that the *General Trading* case carried the exercise of state power to the verge of the law and that further extensions of that power cannot be tolerated without irreparable injury to the economic fabric of the nation. Specifically appellant contends that the Maryland statute as construed and applied by the highest court of that State, conflicts with the Federal Constitution in two respects:

(1) it invades the area reserved to exclusive federal jurisdiction by Section 8 of Article I;

(2) it attempts to extend the power of the State beyond its borders in violation of the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

I.

The Tax Is Invalid Because It is Prohibited By The Commerce Clause Of The Federal Constitution.

No object was nearer to the hearts of the framers of the Federal Constitution than to eliminate those barriers which had been erected by the states to the freedom of movement across state borders. That it was to accomplish this object that Article I, Section 8, of the Federal Constitution gave Congress the power "to regulate commerce with foreign nations and among the several states", has been recognized since *Gibbons v. Ogden*, 9 Wheat 1 (1824). So recently as 1949 this Court stressed the significance of this constitutional history, *Hood v. DuMond*, 336 U. S. 525, 533-535 (1949). This great objective of the framers was further advanced by the adoption of Article IV, Section 2, which provided that the "citizens of each state shall be entitled

to all privileges and immunities of the citizens in the several states". *Crandall v. Nevada,* 6 Wall 35 (1868); *Colgate v. Harvey,* 296 U. S. 404 (1935); *Toomer v. Witsell,* 334 U. S. 385 (1948); and see concurring opinions in *Edwards v. California,* 314 U. S. 160 (1941). See also the interesting opinion in *Anderson v. Mullaney,* (9 Cir.) 191 F. 2d 123 (1951), affd. *Mullaney v. Anderson,* 342 U. S. 415 (1952). As the privileges and immunities guaranteed by Article IV, Section 2, (and by the Fourteenth Amendment) are limited to those of natural persons, *Liberty Warehouse Co. v. Burley T. G. Co-op M. Asso.,* 276 U. S. 71 (1928), corporations must look to the commerce clause for their protection.

Since *Cooley v. Board of Port Wardens,* 12 How. 299 (1851), it has been clear that the commerce clause does not, of its own force, prohibit all regulation by a state of movement across state borders. Thus a state may regulate the size and weight of motor cars moving into the state to insure the sane and economical use of the state's highways, *South Carolina State H. Dept. v. Barnwell Bros.,* 303 U. S. 177 (1938). It may insure the fitness and integrity of those negotiating contracts for interstate transportation by licensing them and requiring a bond to insure their good behavior, *California v. Thompson,* 313 U. S. 109 (1941). It may require those who use its highways to designate an agent upon whom process may be served in suits for damages arising out of interstate movements within the state, *Kane v. New Jersey,* 242 U. S. 160 (1916); *Hess v. Pawloski,* 274 U. S. 352 (1927); and it may impose a tax for the privilege of using its roads in interstate commerce, *Hendrick v. Maryland,* 235 U. S. 610 (1915); *Capitol Greyhound Lines v. Brice,* 339 U. S. 542 (1950). It may even require a manufacturer engaged in transporting his own products in interstate commerce to apply for a cer-

tificate of convenience and necessity provided that such a certificate will be granted as a matter of course upon payment of a nominal fee. *Fry Roofing Co. v. Wood*, 344 U. S. 157 (1952).

But this power has recognized limits. It may not be used to exact a tax for the privilege of doing interstate business, *Spector Motor Service v. O'Connor*, 340 U. S. 602, 608-609 (1951). Nor may a tax be levied "upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself." *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 88-89 (1948), per Mr. Justice REED. Particularly offensive is any attempt of the states to exercise their regulatory power so as to protect the local economy from the effect of interstate commerce. *Buck v. Kuykendall*, 267 U. S. 307 (1925), and *Bush v. Maloy*, 267 U. S. 317 (1925), struck down attempts of the states to exclude interstate motor carriers in order to limit competition. *Baldwin v. Seelig*, 294 U. S. 511 (1935), condemned legislation prohibiting the sale within the state of milk brought into the state and bottled there for which less than a minimum price had been paid to the producer in another state. *Hood v. DuMond*, 336 U. S. 525 (1949), set aside a law which the state courts had construed to authorize denial of a permit to a corporation engaged in distributing milk across state lines to build a new milk receiving station, the purpose of the denial being to protect other local distributors from destructive competition and to insure a needed supply to the local market.

In *Baldwin v. Seelig, supra*, cited above, Mr. Justice CARDOZO, with his customary eloquence expounded the underlying purposes of the commerce clause. He said:

> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catch-

words are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result" (294 U. S. at 527).

In *Freeman v. Hewit*, 329 U. S. 249 (1946), this Court held that the state of Indiana could not include within the scope of a gross income tax the proceeds of securities sold outside of the state. Speaking for the majority of the court, Mr. Justice FRANKFURTER said:

"It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce." (329 U. S. at 254).

Similarly in *McLeod v. Dilworth*, 322 U. S. 327 (1944), the court held that Arkansas lacked power to require a non-resident vendor to pay a sales tax on sales solicited in Arkansas but consummated beyond the borders of the state. Mr. Justice FRANKFURTER again speaking for the majority held that a tax on such a sale:

> "* * * involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States." (322 U. S. at 330-331).

The tax with which we are presently concerned is not a sales tax. It is a use tax and may be exacted from him who uses the property within the state, even though the sale to the user is not in itself subject to tax, *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937). Our question relates, however, not to the power of the state to tax the user but to its power to exact that tax from the seller. Where, as in the present case, the seller is not qualified to do business in the state and is engaging in no activities in the state other than continuous interstate movement, may a state impose upon the seller liability for the use tax which concededly it might properly collect from the purchaser?

No case can be cited supporting so broad an exercise of state power. In *Monamotor Oil Co. v. Johnson*, 292 U. S. 86 (1934), the court upheld legislation requiring one who engaged in the local distribution of petroleum products to collect and pay to the state a use tax. In that case the complaining taxpayer was a foreign corporation doing business in the taxing state where it maintained storage facilities, a refinery and numerous service stations. While there is some broad language in the case, this language was in-

tended to be read in connection with the facts. This was made clear by the author of the opinion in the *Monamotor* case, Mr. Justice ROBERTS, in the dissenting opinion which he filed in *Nelson v. Sears Roebuck & Co.*, hereinafter cited.

Felt and T. Mfg. Co. v. Gallagher, 306 U. S. 62 (1939), upheld a California statute imposing a similar requirement on retailers who maintained a place of business in the state.

In *Nelson v. Sears Roebuck & Co.*, 312 U. S. 359 (1941), the Court held that a foreign corporation doing business in a state through retail stores could be compelled to act as agent for the state in the collection of a use tax on goods sold to local buyers through a separate mail-order department. Speaking for the majority Mr. Justice DOUGLAS said:

> "So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held not to be an unconstitutional burden on a foreign corporation in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 78 L. ed. 1141, 54 S. Ct. 575, and *Felt & T. Mfg. Co. v. Gallagher*, 306 U. S. 62, 83 L. ed. 488, 59 S. Ct. 376. But respondent insists that those cases involved local activity by the foreign corporation as a result of which property was sold to its local customers, while in the instant case there is no local activity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the 'impotence of state power.' *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, ante, 61 S. Ct. 246, 130 A. L. R. 1229, supra. Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. Cf. *Wisconsin v. J. C. Penney Co.*, supra. Respondent cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail

orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts" (312 U. S. at 364).

We have previously referred to the case of *General Trading Company v. State Tax Commission of Iowa*, 322 U. S. 335 (1944), where a non-resident was held liable to pay a use tax on goods shipped into the state of Iowa pursuant to orders solicited by traveling salesmen. As appears from the concurring opinion of Mr. Justice RUTLEDGE (322 U. S. at 354) the record in that case supported a finding that the salesmen were engaged in continuous and regular courses of solicitation in the state of Iowa. Here, in contrast, no salesman of the appellant operated in the state of Maryland; no negotiations were conducted here, nor were any orders taken here. The only activities of appellant in Maryland were those of continuous interstate movement. Appellant used the mails to communicate with its customers; it advertised in Delaware newspapers, some copies of which crossed the state line; it broadcast in Delaware and the electronic waves did not stop at the border; it sent its trucks out from its Delaware store, storeroom or warehouse to make deliveries and crossed the state line to do so. That no tax could be imposed by the State of Maryland upon appellant for the privilege of advertising in that state by mail or radio or of delivering goods in the state by truck is clearly established by the authorities which have previously been cited. If it cannot be taxed for this privilege, upon what theory can it be made liable for taxes due from its customers? Is this not really an exaction for the privilege of doing interstate business?

Plainly enough, the non-resident seller who confines his activities strictly to Delaware could not be made liable for the use tax. If the Company were simply to cease making deliveries to customers, Maryland could assert no right to hold it liable for use taxes, even though its customers used the goods in this state. Thus the Delaware merchant who makes no deliveries across state lines is immune. We have here, then, a tax which can be avoided by the simple expedient of not engaging in interstate commerce; but is it not this very suppression of interstate movement that the use tax was designed to accomplish and the commerce clause was designed to prevent?

It may be argued that the state has the right to impose a burden on those who make deliveries within its borders, and in this connection reference may be made to a phrase appearing in the opinion in *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 58 (1940), where it was said that the tax there sustained was "conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption." See also *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 393 (1952). It is not to be supposed that these few words were intended to overrule the long line of cases holding that delivery in the state pursuant to an interstate sale does not give power to impose a license tax. *Caldwell v. North Carolina*, 187 U. S. 622 (1903); *Crenshaw v. Arkansas*, 227 U. S. 389 (1913); *Stewart v. Michigan*, 232 U. S. 665 (1914). In *Wagner v. Covington*, 251 U. S. 95, 100-101 (1919), the court said:

> "It is indisputable, that with respect to the goods occasionally carried upon plaintiffs' wagon from one state to the other in response to orders previously received at their place of business in Cincinnati, plaintiffs are engaged in interstate commerce not subject to the licensing power of the Kentucky municipality."

In referring to "local activity" in the *Berwind-White* case, Mr. Justice STONE no doubt had in mind the fact amply established by the record in that case that the seller had a sales office in New York City and that all the contracts with the New York customers in question were solicited there (309 U. S. at 44). This was also true in the companion cases of *McGoldrick v. Felt & T. Mfg. Co.* and *McGoldrick v. DuGrenier*, 309 U. S. 70, 76-77 (1940).

It is always possible to select some step in an interstate transaction and to characterize it as local. In *Nippert v. Richmond*, 327 U. S. 416 (1946), this court held, ratifying a long line of previous decisions, that the city of Richmond could not exact a license tax from one engaged in soliciting interstate business. There also counsel invoked the language of the *Berwind-White* opinion cited above. Speaking for this Court, Mr. Justice RUTLEDGE replied as follows:

> "Appellee's rationalization takes only partial account of the reasoning and policy underlying the Berwind-White decision and its differentiation of the drummer authorities. If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes places within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic

process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result.

"It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax. But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, whether or not a 'local incident' related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce." (327 U. S. at 423-424).

Stated in another way the real question is whether the local event is so much a part of interstate business that a tax upon it is in effect a tax upon the interstate business itself. See the opinion of Mr. Justice REED in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 88-89 (1948).

Maryland argues that delivery is just as much local activity as solicitation. It contends that *Wagner v. Covington, supra,* and the other cases holding the states powerless to license merchants engaged in making deliveries across the state borders are distinguishable here, just as the long line of cases culminating in *Nippert v. Richmond, supra,* which forbade the states to exact license taxes from those whose salesmen solicit orders from within the state, were distinguished in the *General Trading Company* case. But

Nippert v. Richmond, supra, at 421-425 and *Breard v. Alexandria,* 341 U. S. 622, 638 (1951), make it very clear that the states are prohibited from licensing those whose traveling salesmen solicit orders for goods within the state not because those activities are lacking in local quality but because such a tax is inherently discriminatory. In contrast, the reason for prohibiting the tax on transactions where deliveries are made within the state is, as pointed out in *Wagner v. Covington* (251 U. S. at 103) that "the transportation of plaintiffs' goods across the state line is of itself interstate commerce."

The State argues that there is no difference between regular solicitation by salesmen operating within the borders of the state and solicitation by the use of the mails to the extent shown in the record in the case at bar. In that connection it should be borne in mind that appellant's mail solicitation was not addressed specifically to its Maryland customers. In fact the periodic mailing of advertising matter was by an automatic card-mailing system based on appellant's list of former purchasers and regardless of the state of residence. To compare this use of United States mails to persistent and continuous operations of salesmen who go from door to door within the State is, it is submitted, to overlook the cardinal feature of this case, namely, that here, unlike *General Trading Company* or any other previously decided case, the taxpayer is engaged in no activities in the State except movement by mail or interstate highways.

Thus we come back to the crucial question, whether delivery by common carrier or in the seller's own trucks constitutes a basis for the imposition of liability on the seller to pay the use tax. In both cases the seller is merely employing an existing channel of interstate commerce; in

the one, a common carrier, and in the other, an interstate highway. It does not appear how the ownership of the truck engaged in travel between Wilmington and a point in the State of Maryland could be material in determining whether goods are being transported in interstate commerce. We respectfully submit that the Federal Constitution forbids the State of Maryland to condition the use of the mails or the highways or any other channel of interstate commerce in the manner herein attempted.

The State argues that since appellant is entitled by the statute (Annotated Code of Maryland, Art. 81, Sec. 384) to withhold 3% of the tax to cover the expense of collection and remittance, the case is governed by the decision of this Court in *Colorado National Bank of Denver v. Bedford*, 310 U. S. 41 (1940). That case added nothing to the law established in *First National Bank v. Kentucky*, 9 Wall. 353 (1870). Both cases involved statutes which made national banks liable for taxes owed by somebody else; in the *Bedford* case, by the holders of safe deposit boxes, in the *Kentucky* case, by holders of the company's capital stock. To the argument advanced in the *Kentucky* case that such an imposition on a national bank fell afoul of the doctrine of *McCulloch v. Maryland*, 4 Wheat. 316 (1819), Mr. Justice MILLER replied as follows:

> "* * * The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. *That limitation is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government.* Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers, into an unauthorized and

unjustifiable invasion of the rights of the States. The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. *It is only when the state law incapacitates the banks from discharging their duties ot the government that it becomes unconstitutional.* We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal Government authorizes the tax." 9 Wall. at 362. (Emphasis supplied.)

Nothing in the bank cases can have any bearing on the questions presented by the present appeal. Appellant's objection to paying the Maryland Use Tax is not based only on its onerous effect but on its invalidity as a direct tax on interstate commerce. In such case, the amount of the tax is immaterial. *Spector Motor Service v. O'Connor*, 340 U. S. 602, 608-609 (1951). "Of course, a State tax on interstate commerce does not become a valid one merely because 'it's only a little one' ". Per FRANKFURTER, J., in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 103-104 (1948).

However, it is a fact that the provisions of the Maryland Use Tax Act do impose a heavy burden upon the hapless

seller. Under Sections 380 and 381 he must file monthly returns to the Comptroller.* Section 383 imposes upon him the duty of regular remittance. Section 386 empowers the Comptroller to require him to give a surety company bond or in lieu thereof Section 387 permits him to deposit securities or cash. Section 390 requires him to obtain a license cancellable under Section 392 by the Comptroller for cause. Section 392 likewise requires that he pay a license fee which is, however, nominal. Section 391 requires him to file a statement when filing his application for license and, finally, Section 393 subjects him to a fine in the event he makes deliveries in the State without having obtained the license as required by Section 390.

Sections of the Sales Tax Law which are applicable to the seller who is subject to the use tax should likewise be considered. Among these are Section 340, imposing penalties for the failure to file a return; Section 341, imposing penalties for the filing of an incorrect return; Section 353, requiring the maintenance of complete and accurate records subject to the Comptroller's control and requiring their preservation for a period of three years; and finally Section 365, imposing heavy penalties for wilful failure to keep the records, file returns or file correct returns.

II.

The Tax Is In Conflict With The Fourteenth Amendment To The Constitution.

The decision of the Court of Appeals appears to be unique in its attempt to extend the jurisdiction of the State over non-residents. The Maryland court held that appellant might be held liable for the collection of the use tax from

* All statutes cited appear in the Appendix hereto (*infra* pp. 31-41).

its Maryland customers "even acknowledging that appellant, a foreign corporation, was not subject to the State's jurisdiction" (R. 43).

In holding that Maryland might exact from appellant a use tax on goods delivered to its customers over the counter in the State of Delaware, the Court of Appeals took a step which is without precedent. We have been able to find no case presenting such a question to this or any other court, but the analogy of *Norton Company v. Department of Revenue*, 340 U. S. 534 (1951), is instructive. There Illinois was held without power to include within the measure of its gross receipts tax the proceeds attributable to orders sent directly by Illinois customers to the seller's home office in Massachusetts where the goods ordered were shipped directly to the customer by the seller. At the same time the court held that Illinois might include within the measure of the tax the proceeds of sales that utilized the seller's Chicago place of business in receiving the orders or distributing the goods. The argument advanced by a minority of this Court that all of the proceeds of petitioner's sales in Illinois could reasonably be attributable to the company's local activities was rejected. So here, even if it might be argued that the local activities are sufficient to meet the test of due process in those cases where appellant makes deliveries within the state, this would not warrant Maryland in taxing transactions where no such deliveries are made.

Cases such as *Nelson v. Sears Roebuck Company*, 312 U. S. 359 (1941), and *Nelson v. Montgomery Ward & Co., Inc.*, 312 U. S. 373 (1941), are plainly distinguishable. In those cases the taxpayers involved were qualified to do business in Iowa (the taxing state) and were operating retail stores there. This Court held that Iowa might rightly

assume that mail-order orders from its residents were "not unrelated to respondents' course of business in Iowa" (312 U. S. at 364). In the *Norton* case the Court held that there was no warrant for a similar assumption. The record in the case at bar presents far less reason for such an assumption than the record in the *Norton* case.

Moreover, it is certainly a matter of grave doubt whether the mere fact of delivery by the appellant standing alone is sufficient to warrant the imposition of a tax where the appellant is conceded to be "not subject to the State's jurisdiction". As Mr. Justice RUTLEDGE pointed out in *Nippert v. Richmond,* 327 U. S. 416, 423 (1946), "even substantial connections, in an economic sense, have been held inadequate to support the local tax". He cited as "the latest instance" the case of *McLeod v. Dilworth,* 322 U. S. 327 (1944), where persistent and systematic solicitation within the state by salesmen employed by the seller was held insufficient to warrant the imposition of a sales tax.

It is true that substantial inroads have been made on the doctrine of *Pennoyer v. Neff,* 95 U. S. 714 (1878). *International Shoe Co. v. Washington,* 326 U. S. 310 (1945), held that the employment of eleven to thirteen salesmen within the state who occasionally rented, at the seller's cost, space for the display of their wares, afforded a sufficient basis to make the seller amenable to proceedings in the courts of the state to recover unpaid contributions to the state unemployment compensation fund. The furthest extension of that doctrine is certainly the decision of this Court in *Travelers Health Asso. v. Virginia,* 339 U. S. 643 (1950), where this Court held that Virginia might bar an insurance company from selling insurance in the state through the mails unless the company designated a statutory agent to accept service of process in suits based on

such policies. The peculiar nature of insurance and the vulnerability of policyholders was thought by a majority of this Court to warrant the state taking steps to give reality to the rights which the policies pretended to give. Mr. Justices REED, FRANKFURTER, JACKSON and MINTON dissented.

Here we are dealing with no helpless policyholder but with the State of Maryland which has ample authority to collect this use tax from its own residents. For the sake of convenience the State has chosen instead to attempt to reach out beyond its borders to impose burdens on those who transact interstate commerce. By using the process of attachment the State has attempted to force non-residents to open their books to the inspection of foreign taxing officials, to submit to the regulations issued by the Comptroller of the State of Maryland and to act as a collecting agent for a state to whose jurisdiction they are admittedly not subject. Here we have essentially that "impotence of state power" which, as Mr. Justice FRANKFURTER pointed out in *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1941), flows from the Constitution itself. Here as there, "the state power has nothing on which to operate."

CONCLUSION

The use tax is in essence a sort of protective tariff and in permitting the states to invoke such measures this court has tolerated a considerable breach in the dike which the Commerce Clause erected against the forces which press for economic autarchy. CRIZ, *The Use Tax: Its History, Administration and Economic Effects*, 4 Pub. Admin. Serv. 43 (1941). As always in such cases, the breach tends to widen and it is submitted that the most vigilant care is needed if a fundamental objective of the Constitution is

not to be lost. The judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

JAMES PIPER,
WILLIAM L. MARBURY,
WILLIAM POOLE,
JAMES L. LATCHUM,
Counsel for Appellant.

APPENDIX*

Excerpts from Article 81 of the Annotated Code of Maryland (1951 ed.), entitled "Revenue and Taxes"

Sub-title "Retail Sales Tax Act".

"Failure to File Returns: Incorrect Returns"

"340. [*280*] (a) Whenever a taxpayer fails to file any return and/or pay the tax when due as required by this sub-title, there shall be assessed against him a penalty of ten percent (10%) of the tax due, plus interest at the rate of one-half of one percent (½ of 1%) per month or fraction of a month from the time the tax was due until paid.

"(b) If the failure to file any return is due to an attempt to defraud, then the penalty shall be, in lieu of the penalty more specifically provided for by sub-section (a) of this section, one hundred percent (100%) of the tax due, plus interest at the rate of one percent (1%) per month or fraction of a month from the time the tax was due until paid.

"(c) Any taxpayer who fails to file proper returns and pay the tax due with penalty and interest within ten (10) days of receiving notice from the Comptroller advising him of his delinquency, shall in addition to the foregoing penalty be assessed a penalty of twenty-five percent (25%) of the tax due.

"(d) When both vendor and purchaser are liable for any tax, a deficiency assessment shall be first levied against the vendor, but such assessment shall not be considered an election of remedies nor bar an assessment against the purchaser for the same tax or part thereof unpaid by the vendor.

"(e) All amounts received from any taxpayer shall be credited first to penalty and interest accrued and then to the tax due."

---

* The italicized section numbers in brackets are those of the 1947 Cumulative Supplement to the 1939 Code.

"341. [*281*] Whenever the Comptroller shall find from an examination of the returns or records of any taxpayer or otherwise that such taxpayer has theretofore filed an incorrect return and paid less than the amount of the tax due under this sub-title, he shall levy a deficiency assessment against such taxpayer. Such assessment shall include the amount of such deficiency, as found by the Comptroller, plus one of the following amounts:

"(1) If the Comptroller finds that the deficiency was not due to an attempt to defraud, there shall be added a penalty of ten percent (10%), plus interest at the rate of one-half of one percent (½ of 1%) per month or fraction of a month from the time the tax was due until paid.

"(2) If the Comptroller finds that any part of the deficiency is due to fraud with an attempt to evade the tax, there shall be added a penalty of one hundred percent (100%), and interest at the rate of one percent (1%) per month or fraction of a month from the time the tax was due until paid.

"(a) Any taxpayer who fails to file correct returns and pay the tax due with penalty and interest within ten (10) days of receiving notice from the Comptroller advising him of the amount of his deficiency, shall in addition to the foregoing penalties be assessed a penalty of twenty-five percent (25%) of the tax due.

"(b) All amounts received from any taxpayer shall be credited first to penalty and interest accrued and then to the tax due.

"(3) Whenever any person who has been found to be either delinquent or deficient as defined in Sections 340 and 341 of this sub-title fails to file a proper return within ten (10) days of notice or demand by the Comptroller, the Comptroller shall determine the taxable sales of such taxpayer for the period or periods involved and compute the tax from the best information available. Such determination and/or computation shall be prima facie correct."

"Records; Investigations and Hearings"

"353. [*293*] (a) Each vendor shall keep complete and accurate records of all taxable sales, together with a record of the tax collected thereon, and shall keep all invoices, bills of lading and such other pertinent records and documents in such form as the Comptroller may, by regulation, require. Such records and other documents shall be open at any time during business hours for inspection and examination by the Comptroller or any of his authorized representatives and shall be preserved for a period of three (3) years unless the Comptroller shall in writing consent to their destruction within that period or by order require that they be kept longer.

"(b) Whenever any taxpayer fails to keep records from which the tax imposed by this subtitle may be accurately computed, the Comptroller may make use of a factor developed by surveying other taxpayers of the same type or otherwise compute the amount of tax due and this computation shall be prima facie correct."

"354. [*294*] (a) For the purpose of enforcing the provisions of this sub-title the Comptroller or any duly authorized agent or representative designated by him:

"(1) May conduct investigations and hold hearings concerning any matter covered by this sub-title at any time or place within the State of Maryland;

"(2) In the conduct of any investigation or hearing, may require by subpoena or summons the attendance and testimony of witnesses and the production of any books, accounts, records, papers and correspondence relating to any matter, which the Comptroller is authorized by this subtitle to determine;

"(3) May sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence.

"(b) In case of disobedience of any subpoena or the contumacy of any witness appearing before the Comptroller

or his duly authorized agent or representative, the Comptroller may apply to the Circuit Court of any of the counties or to the Baltimore City Court for an Order. Such Court may thereupon issue an Order requiring the person subpoenaed to obey the subpoena or to give evidence or produce books, accounts, records, papers and correspondence touching the matter in question. Any failure to obey such order of Court, may be punished by such Court as a contempt thereof."

"Penalties"

"365. [*305*] Any taxpayer or any officer of a corporate taxpayer

"(a) who wilfully fails to collect the tax imposed by this sub-title in accordance herewith; or

"(b) who wilfully fails to pay over the tax imposed by this sub-title in accordance herewith; or

"(c) who wilfully fails to file any return required by this sub-title; or

"(d) who makes any wilfully false statement or misleading omission in any return pursuant to this sub-title; or

"(e) who wilfully fails to keep records in accordance with this sub-title and any regulations of the Comptroller pursuant hereto, shall be guilty of a misdemeanor and upon conviction shall be fined not more than One Thousand Dollars ($1,000.00) or imprisonment for not more than one year, or both."

Sub-title "Maryland Use Tax".

"368. [*308*] (Definitions) As used in this sub-title, the following terms shall mean or include:

* * * * * *

"(k) 'Engaged in business in this State' means the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State. This term shall include, but shall not be limited to the following acts or methods of transacting business.

"(1) The maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, of any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

"(2) The having of any representative, agent, salesman, canvasser, or solicitor operating in this State for the purpose of selling, delivering, or the taking of orders for any tangible personal property."

* * * * * *

"369. [*309*] (Imposition of tax). An excise tax is hereby levied and imposed on the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State on or after the effective date of this Act, for use, storage or consumption within this State. The tax imposed by this section shall be paid by the purchaser and shall be computed as follows:

"(a) On each sale where the price is from fifty-one cents (51¢) to one Dollar ($1), both inclusive, two cents (2¢).

"(b) On each fifty cents (50¢) of price or fraction thereof in excess of One Dollar ($1), one cent (1¢)."

"Collection of Tax"

"371. [*311*] Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this sub-title, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser."

"373. [*313*] Every vendor required or permitted to collect the tax shall collect the tax imposed by the provision of this sub-title, notwithstanding the following:

"(a) That the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the vendor at a point outside of this State as a result of solicitation by the vendor through the medium of a catalog or other written advertisement; or

"(b) That the purchaser's order or contract of sale made or closed by acceptance or approval outside of this State or before said tangible personal property enters this State; or

"(c) That the purchaser's order or contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this State and shipped directly to the purchaser from the point of origin; or

"(d) That said property is mailed to the purchaser in this State from a point outside this State or delivered to a carrier at a point outside this State, F. O. B., or otherwise, and directed to the vendor in this State, regardless of whether the cost of transportation is paid by the vendor or by the purchaser; or

"(e) That said property is delivered directly to the purchaser at a point outside this State, if it is intended to be brought to this State for use, storage or consumption in this State."

"374. [*314*] The tax to be collected as provided in this sub-title shall be stated and charged separately from the sale price and shown separately from the sale price on any record thereof at the time when the sale is made or at the time when evidence of the sale is issued or employed by the vendor. The tax shall be paid by the purchaser to the vendor, as trustee for and on account of the State, and the vendor shall be liable for the collection thereof for and on account of the State."

"375. [*315*] The vendor and any other officer of any corporate vendor required or permitted to collect the tax imposed by this sub-title shall be personally liable for the tax collected, and such vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property and payable at the time of the sale. Any vendor who fails to collect the tax pursuant to this sub-title and the regulations prescribed hereunder shall, in addition to all other penalties, be personally liable to the State for the amount uncollected."

"376. [*316*] The tax hereby imposed shall apply and be collected by the vendor required or permitted to collect the tax imposed by this sub-title from the purchaser at the time the sale is made regardless of the time when the purchase price is paid and delivered; unless the Comptroller shall provide by regulation in the case of credit or installment sales for the payment of the tax upon collection of the price or installments of the price or at some other time."

"379. [*319*] For the purpose of the proper administration of this sub-title and to prevent evasion of the tax and the duty to pay the same as herein imposed, it shall be presumed that the tangible personal property sold by any person for delivery in this State, however made or carried, is sold for use, storage or consumption in this State. A like presumption shall apply to all tangible personal property delivered without this State and brought into his State by the purchaser thereof. The presumption contained in this

section may be overcome if the purchaser shall have in his possession a certificate, in such form as the Comptroller may prescribe, evidencing the fact that the tangible personal property was not sold for use, storage or consumption in his State as those terms are defined in Section 368 of this sub-title."

"Returns and Payment of Tax"

"380. [*320*] Before the fifteenth day of August, 1947, and before the fifteenth day of each calendar month thereafter, every vendor engaging in business in this State and every vendor not engaging in business in this State but who, upon application to the Comptroller, has been expressly authorized to collect the tax, shall make a return to the Comptroller, covering the preceding calendar month. The Comptroller may permit or require such returns to be made for other periods and upon such other dates as he may by regulation specify."

"381. [*321*] The form of returns required to be filed by Section 380 of this sub-title shall be prescribed by the Comptroller and shall contain such information as he may deem necessary for the proper administration of the tax. Such returns shall show, among other things the aggregate value of the tangible personal property sold by the vendor, the use, storage or consumption of which became subject to the tax imposed by this sub-title during the period of time covered by the return."

"382. [*322*] Before the fifteenth day of August, 1947, and before the fifteenth day of each calendar month thereafter, every person purchasing tangible personal property, the use, storage or consumption of which is subject to the tax imposed by this sub-title, and who has not paid the tax imposed by this sub-title to a vendor required or authorized to collect the same, shall make a return to the Comptroller covering the preceding calendar month. The Comptroller may permit or require such returns to be made for other periods and upon such other dates as he may by regulation specify. Such returns shall show the value of the tangible personal property purchased by such person, the use, stor-

age or consumption of which became subject to the tax imposed by this sub-title during the period of time covered by the return."

"383. [323] At the time of filing the returns as specified in Section 380 and 382 of this sub-title, the vendor or person so filing said returns shall pay to the Comptroller the taxes imposed by Section 369 of this sub-title."

"384. [324] The vendor or person subject to tax as provided in this sub-title shall be entitled to apply and credit against the amount of tax payable by him as stated in Section 383, an amount equal to three per cent (3%) of the gross tax to be remitted to the Comptroller to cover the expense in the collection and remittance of said tax; provided, however, that nothing contained in this section shall apply to any vendor or person who shall fail or refuse to file his return with the Comptroller within the time prescribed by Sections 380 and 382 of this sub-title."

"386. [327] Where the Comptroller, in his discretion, deems it necessary to protect the revenues to be obtained under the provisions of this sub-title, he may require any taxpayer [to] file with him a bond issued by a surety company authorized to do business in this State and approved by the State Insurance Commissioner as to solvency and responsibility, in such amounts as the Comptroller may fix to secure the payment of any tax or penalties due or which may become due from such taxpayer. In the event that the Comptroller determines that a taxpayer is to file such a bond, he shall give notice to such taxpayer to that effect, specifying the amount of the bond required. The taxpayer shall file such bond within five (5) days after the giving of such notice unless within such five (5) days the taxpayer shall request in writing a hearing before the Comptroller, at which hearing the necessity, propriety and amount of the bond shall be determined by the Comptroller. Such determination by the Comptroller shall be final and shall be complied with within fifteen (15) days after the taxpayer is given notice thereof."

"387. [328] In lieu of the bond required by Section 386 of this sub-title, securities approved by the Comptroller or cash in such amount as he may prescribe may be deposited, which shall be kept in the custody of the Comptroller, who may at any time, without notice to the depositor, apply them to any tax and/or interest or penalties due, and for that purpose the securities may be sold by the Comptroller at public or private sale without notice to the depositor."

"Registration"

"390. [331] Every vendor engaged in business in this State except those registered under Section 356 of this Article, who shall sell or deliver tangible personal property for use, storage or consumption in this State shall obtain a license for the privilege of engaging in said business. Such person shall apply for the license required by this section within sixty (60) days from and after July 1, 1947."

"391. [332] Each applicant for a license required by Section 390 of this sub-title shall on or before the first day of August, 1947, make out and deliver to the Comptroller, upon a blank to be furnished by him for that purpose, a statement showing the name of the applicant, the name and addresses of all agents of the applicant operating within this State, the location of any and all distribution houses or other places of business of the applicant in this State, and such other information as the Comptroller may prescribe."

"392. [333] At the time of making his application as required by Section 391 of this sub-title, the applicant shall pay to the Comptroller a license fee in the sum of One Dollar ($1). Upon receipt of such application and the fee as herein prescribed, the Comptroller shall issue to the applicant a license authorizing the applicant to sell or deliver tangible personal property for use, storage, or consumption in this State. The license shall be non-transferrable except as otherwise provided in the sub-title and shall be displayed in the applicant's place of business. Except as otherwise provided in this sub-title, the license issued

as herein provided shall continue valid until surrendered by the vendor or cancelled for cause by the Comptroller. The form of such license shall be as prescribed by the Comptroller."

"393. [334] Whoever engages in business in this State, except those registered under Section 355 of this Article, who shall sell or deliver tangible personal property for use, storage or consumption in this State without having a license as provided in Section 390 of this sub-title shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than Twenty-five Dollars ($25.00) nor more than One Hundred Dollars ($100.00)."

"Applicability of Other Sections"

"394. [335] All provisions not inconsistent with the provisions of this sub-title in Sections 340 and 341 of this Article relating to failure to file returns and incorrect returns; in Sections 343-346, both inclusive, of this Article relating to refunds; in Sections 347 and 348 of this Article relating to revisions and repeals;* in Sections 353-355, both inclusive, of this Article relating to records, investigations and hearings; in Section 361 of this Article relating to general powers of the Comptroller; in Sections 363-364, both inclusive, relating to general provisions; in Section 365 of this Article relating to penalties; and in Section 366 of this Article relating to disposition of proceeds are hereby made a part of this sub-title and shall be applicable hereto."

* The word "appeals" evidently intended.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EDWARD D. E. ROLLINS,
Attorney General;
J. EDGAR HARVEY,
Deputy Attorney General;
FRANCIS D. MURNAGHAN, JR.,
Assistant Attorney General,
Counsel for Appellee.

INDEX

Subject Index

Table of Cases Cited

Statutes and Other Authorities Cited

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION, AND MOTION TO DISMISS OR AFFIRM.

The State of Maryland, Appellee in the above entitled cause, by its counsel, Edward D. E. Rollins, Attorney General, J. Edgar Harvey, Deputy Attorney General, and Francis D. Murnaghan, Jr., Assistant Attorney General, for its Statement in Opposition to Appellant's Statement of Jurisdiction herein, and in support of its Motion to Dismiss or Affirm, respectfully shows the following:

I

Statement of Issues on Appeal

The question raised by this appeal is whether the State of Maryland may constitutionally impose the duty of collection of its use tax upon a vendor whose principal place of business is located in Wilmington, Delaware, and whose contacts with the State of Maryland are:

1. Deliveries to points in Maryland, in the vendor's trucks, at the expense of the vendor, of goods sold to Maryland residents.

2. Deliveries to points in Maryland by common carrier, at the expense of the vendor, of goods sold to Maryland residents.

3. Advertisements sent from Wilmington, Delaware, by mail or radio broadcast to Maryland residents.

The tax collection duty has been imposed with respect to goods sold to Maryland residents, and delivered to them:

(a) In the vendor's trucks, at the vendor's expense;
(b) By common carrier at the vendor's expense; and
(c) Directly at the vendor's place of business in Wilmington, Delaware.

The Court of Appeals of Maryland determined that the Maryland Use Tax Act, Article 81, Sections 368 through 396 of the Annotated Code of Maryland (1951 Ed.) required that Appellant collect use taxes with respect to goods delivered in all three manners, and further held that this requirement violated neither the Commerce Clause, Article I, Section 8, of the Constitution of the United States, nor the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

II

No Substantial Federal Question Is Presented by the Attempted Appeal

A. Commerce Clause

Appellant's contentions under the Commerce Clause have been completely foreclosed by decisions of the Supreme Court of the United States sustaining use taxes imposed by the State of receipt on goods transported in interstate commerce. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937); *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939). Appellant acknowledges that the Maryland Use Tax itself is valid and may be imposed against the Maryland pur-

chasers from it, even though the goods involved moved in interstate commerce, contesting only the requirement that Appellant collect use tax on behalf of the State. However, it is beyond dispute that the duty to collect such taxes may be imposed upon a vendor located and doing business in Maryland, even as to goods which had been transported in interstate commerce. *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 (1934). The impact on such commerce would be exactly the same whatever variations in method of collecting the tax may be imagined. The cost of marketing the goods is not affected by the character of the tax collector pressed into service by the State. Hence, even were Appellant completely unconnected with the State of Maryland, imposition of the tax collecting duty upon it could not be deemed to create a burden upon interstate commerce, whatever the objections that might be raised under the Due Process Clause. The combined onus of the tax and of the duty of collecting it in its effect upon interstate commerce is identical, whether the private tax collecting agent appointed by the State is located within or without the State, or whether his activities are local or interstate in character. Appellant confuses the imposition of a burden on interstate commerce, which is prohibited by the Constitution, with the imposition of an obligation upon someone engaged in interstate commerce, which will not run afoul of the commerce clause so long as the commerce itself is not thereby burdened. It is fully established that the restriction by the vendor of its activities to ones solely interstate in character does not prohibit the imposition of the duty to collect use taxes. *General Trading Co.* v. *State Tax Comm. of Iowa*, 322 U. S. 335 (1944); *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939).

Furthermore, Appellant confuses a tax, which might be invalid if imposed upon an instrumentality of interstate

commerce, with the duty of tax collection which cannot be conceived of as a burden on the collector, at least so long as adequate provision for compensating the costs which he incurs is made. Thus, in *Colorado National Bank of Denver* v. *Bedford*, 310 U. S. 41 (1940), a tax collecting duty placed upon a Federal instrumentality was upheld, although it was acknowledged that imposition of the tax itself upon the Federal instrumentality would have been unconstitutional. As in that case, a tax collector under the Maryland Use Tax Law is entitled by Section 384 of Article 81 of the Annotated Code of Maryland (1951 Ed.) to retain 3% of tax collections to cover his expenses.

Maryland competitors of Appellant reap no advantage over Appellant as a result of the decision of the Maryland Court of Appeals, for they too must collect a sales or use tax of equal amount on their sales to Maryland residents. Indeed, were Appellant and others similarly situated not obliged to collect use taxes on sales in the Maryland market they would enjoy an unwarranted competitive advantage over Maryland merchants who must contribute to the support of the government which creates and protects the market. It is not the purpose of the Commerce Clause to foster such discrimination. *International Harvester Co.* v. *Dep't of Treasury*, 322 U. S. 340 (1944); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940).

B. Due Process Clause

Since the decision of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), it is manifest that, in so far as the due process clause is concerned, a State may let the impact of its laws be felt by anyone who conducts activities within the State which are reasonably related to the laws involved. The fact that a corporation, such as Appellant, is not "doing business", in the traditional sense, does not

render it immune from State regulation of such activities as it does conduct within a State's borders. Here we are concerned with activities of Appellant designed to enter and tap the market created under, protected by and existing because of the laws of the State of Maryland. The obligation here enforced against Appellant grows out of and is solely concerned with such activities. In so far as goods delivered in Appellant's own trucks to Maryland residents are concerned, there is no substantial due process objection, in view of the holding in *General Trading Co.* v. *State Tax Comm. of Iowa*, 322 U. S. 335 (1944). Delivery of the very goods with respect to which the tax collecting duty is imposed is at least as substantial activity in Maryland as generalized solicitation, the activity deemed sufficient in that case to justify imposition of the duty. Delivery by the vendor is well established to be a local activity subject to regulation and specifically to the duty of collection of tax. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940).

In so far as delivery by a common carrier is concerned *where the expense is borne by the vendor*, it is not in issue in this case whether such activity standing alone provides enough contacts with the State of Maryland to satisfy the due process clause. Here, such deliveries are only part of Appellant's over-all entry into the Maryland market. Since some of that entry, for reasons stated above, is clearly within the jurisdiction of the State, the tax collection duty may also be imposed with respect to the goods delivered by common carrier. In *Nelson* v. *Sears-Roebuck & Co.*, 312 U. S. 359 (1941), and *Nelson* v. *Montgomery Ward & Co., Inc.*, 312 U. S. 373 (1941), the right to require collection of use tax was upheld with respect to goods mailed or shipped by common carrier from without the State, on unsolicited orders sent by the purchasers to a place of business of the

vendor located in another State. The vendor conducted other business within the State clearly subject to its control and the Court held that the mail-order activities were part of the vendor's general business in the State and thus subject to the State Use Tax Law.

The third category of goods, those delivered to Maryland purchasers in Wilmington, Delaware, might, on first blush, appear to present an issue beyond settled decisions of the Supreme Court. However, it is important to realize that the assessment made by the Maryland taxing authorities, in respect to such goods, was made solely on the basis of information volunteered by Appellant. In preparing the Agreed Statement of Facts, on which this case has been tried, the Maryland taxing authorities accepted the determination by Appellant of the amounts of sales falling into each of the three categories here concerned. Thus, it is evident that the instances, as to which the assessment was made, where delivery was effected at Appellant's store in Wilmington, Delaware, were all ones in which Appellant knew at the time of the sale that the goods would be used, consumed or stored in Maryland. No attempt is here made to assert a tax collecting duty with respect to deliveries made in Delaware where the ultimate destination of the goods was unknown by the vendor at the time of sale, and it only subsequently developed that the goods were in fact brought to Maryland. Admittedly the record does not fully reveal this limitation upon the assessment with respect to goods delivered in Wilmington. However, we deem it essential to bring the point to the Court's attention for it is jurisdictional in nature. No case or controversy is here presented with respect to goods delivered by Appellant in Wilmington, Delaware, without knowledge that they would be used, consumed or stored in Maryland. If the Agreed Statement of Facts to any extent suggests that such a situa-

tion is presented, it inadvertently presents a hypothetical, not a real picture. The Supreme Court will not consider abstract propositions, particularly ones involving constitutionality of legislation, in the absence of an actual case or controversy. See e.g. *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U. S. 249 (1933).

Since Appellant knew in all cases when delivery was made in Delaware that the goods were being sold to Maryland residents for use there, the situation is no different than that dealt with in *Nelson* v. *Sears-Roebuck & Co.*, 312 U.S. 359 (1941). In that case delivery to the purchaser was accomplished outside the State asserting the tax collecting duty, since delivery was by mail or common carrier. Cf. *Nelson* v. *Montgomery Ward & Co., Inc.*, 312 U.S. 373 (1941) f.n. 3.

We, therefore, submit that the questions presented in this appeal have been so definitely determined that no substantial question is presented entitling Appellant to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, Appellee respectfully moves that the appeal be dismissed or that the judgment and Order of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

EDWARD D. E. ROLLINS,
Attorney General,

J. EDGAR HARVEY,
Deputy Attorney General,

FRANCIS D. MURNAGHAN, JR.,
Asst. Attorney General,
Counsel for Appellee.

ACKNOWLEDGMENT OF SERVICE OF THE FOREGOING DOCUMENT, DATED JUNE 16th, 1953, OMITTED IN PRINTING.

(9116)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR APPELLEE

EDWARD D. E. ROLLINS,
Attorney General,

J. EDGAR HARVEY,
Deputy Attorney General,

FRANCIS D. MURNAGHAN, JR.,
Asst. Attorney General,

Attorneys for Appellee.
1201 Mathieson Building,
Baltimore 2, Maryland.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

TABLE OF CITATIONS

Cases

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR APPELLEE

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland has not been officially reported. It is printed in the Record (R. 35-44) and reported in 95 A. (2d) 286. The opinion of the Superior Court of Baltimore City has not been officially reported. It is printed in the Record (R. 15-33).

JURISDICTION

Appellee adopts the Statement of Jurisdiction appearing at page 1 of Appellant's Brief.

THE QUESTION PRESENTED

Where an Out-of-State Vendor Sells to Maryland Purchasers Goods Which Are Used by the Purchasers in Maryland, May the State Require Collection by the Vendor of Use Taxes on Goods so Purchased Where the Vendor Delivers some of the Goods to Points in Maryland, Either in its Own Trucks or by Common Carrier at the Vendor's Expense, and also Advertises in Maryland by Newspapers Circulated there, by Broadcasts Heard there, and by Mail Addressed to Maryland Residents?

STATUTES INVOLVED

Appellee adopts the Statement of Statutes Involved appearing at page 2 of Appellant's Brief, with the following addition: Article 81, Section 370 of the Annotated Code of Maryland (1951 Ed.) sets forth exemptions from the Maryland Use Tax Act. Subsection (d) thereof exempts:

> "Tangible personal property upon the sale of which or upon the gross receipts received from the sale of which an excise tax equal to or greater than that hereby levied has been imposed under the laws of any State or territory, of the United States of America, or any political subdivision thereof, or the District of Columbia. If the tax paid to such other State or territory of the United States of America, or any political subdivision thereof, or the District of Columbia is less than that imposed by this sub-title, the difference between the tax so paid and that imposed by this subtitle shall be paid to the Comptroller."

STATEMENT OF THE CASE

Appellee adopts the Statement of the Case appearing at page 3 of Appellant's Brief, with the following addition:

(1) Deliveries by motor vehicles owned and operated by Appellant were of property sold for at least $8,000 (R. 12);

(2) Deliveries by common carrier, the charges being borne by Appellant, were of property sold for at least $1,500 (R. 13); and

(3) Deliveries to the purchaser in Wilmington were of property sold for at least $2,500 (R. 12).

THE PROCEEDINGS BELOW

Appellee adopts the Statement of the Proceedings Below appearing at page 4 of Appellant's Brief.

SUMMARY OF ARGUMENT

The duty placed on Appellant, under Maryland law, to collect use taxes on goods sold by it to Maryland purchasers does not offend the commerce clause. The statute involved in no way, either in theory or practice, operates to benefit local vendors at the expense of vendors such as Appellant, since every local vendor must perform the same duty. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33; *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359. Delivery, the incident upon which the statute rests the requirement, is local, not interstate in character. *McGoldrick v. Berwind-White Coal Mining Co., supra.* The duty to act as the State's tax collector has several times been deemed one a State may exact even of vendors engaged solely in interstate

commerce. *General Trading Co. v. State Tax Comm. of Iowa*, 322 U. S. 335; *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62.

Nor does the statute, as applied to Appellant, infringe in any way the due process clause. The delivery of goods in vehicles of Appellant in Maryland provides an abundantly sufficient contact with the State to justify requirement of a function so intimately associated with the actions comprising the contact as collection of use tax on the goods delivered. *International Shoe Co. v. Washington*, 326 U. S. 310; *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33. The deliveries by common carrier, since the charges were exclusively borne by Appellant, similarly were a contact with the State sufficient to support the exaction as to goods so delivered. Even were deliveries by common carrier to be classified, together with deliveries to the purchasers at Appellant's store in Wilmington, Delaware, as activities wholly without the State of Maryland, still the sales concerned were part of Appellant's overall Maryland business. As such, the contacts with Maryland clearly established in cases of deliveries in Appellant's own trucks suffice to require collection of the use taxes on all sales to Maryland purchasers. *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson v. Montgomery Ward & Co., Inc.*, 312 U. S. 373. Independently, Appellant's contacts with Maryland through newspaper, radio, television and mail advertising circulated there were sufficient to sustain the demand that use taxes be collected on goods delivered outside the State. *Nelson v. Montgomery Ward & Co., Inc., supra.*

ARGUMENT

I.

Requirement by a State that a Vendor Collect from the Purchaser Use Taxes on the Property Sold is not a Violation of the Commerce Clause of the Federal Constitution Although the Sale is one in Interstate Commerce, and this is so even if the Vendor's Activities are Solely Interstate Commerce.

Verbally, the difference between the parties to this litigation is brought into clear focus by the insistence upon the use of different language by the two to describe the imposition of which Appellant complains. Appellant asserts that a use tax is directly levied on it. Appellee, just as forcefully, maintains that it seeks not to tax Appellant but only to enforce Appellant's duty under the Maryland Use Tax statute to collect the tax from the actual users, the Maryland purchasers from Appellant. For the benefit of this Honorable Court, it may be well to recite briefly the actual manner in which the Maryland Use Tax Act impinges upon Appellant, so that it may decide for itself which characterization more accurately meets the circumstances. Under Section 369 of Article 81 of the Annotated Code of Maryland (set out at page 35 of Appellant's Brief and Appendix), the use tax is imposed upon the purchaser. By Section 371 of Article 81 (page 36 of Appellant's Brief and Appendix), a vendor engaged in business in Maryland is required to collect the tax from the purchaser, on behalf of the State. Where the vendor complies with this statutory duty, there is no imposition on it. The expenses of acting as the State's collector are compensated by reason of Section 384 of Article 81 (page 39 of Appellant's Brief and Appendix), which authorizes the vendor to retain

three percent of all taxes collected. Only in such a case as the present one, where the vendor fails to collect the tax, does it feel any imposition of the tax. In such a case, the statute requires the vendor to furnish the amount of the tax not collected, not on the theory that it is then the taxpayer, but rather as a penalty for failure to perform the statutory duty.

The Maryland statute clearly imposed the duty of tax collection upon the present Appellant for, by Section 371 of Article 81 (page 36 of Appellant's Brief and Appendix), collection is required of "[e]very vendor engaged in business in this State". By Section 368 (page 35 of Appellant's Brief and Appendix), "engaged in business in this State" is defined to include, *inter alia*, "[t]he having of any representative * * * operating in this State for the purpose of * * * delivering * * * any tangible personal property". It, therefore, is only on constitutional grounds that Appellant can rely, and it is because its chances of successful constitutional attack rest so heavily upon cases dealing with taxes directly imposed on instrumentalities of interstate commerce that it insists so vehemently on the description of Maryland's imposition as a tax directly on it. If, as the State of Maryland believes, its description of the imposition as the requirement of the collection of a tax from another more accurately covers the situation, little or no support can be found by Appellant for its contentions in the principles of constitutional law developed and enunciated by this Honorable Court.

Like the analogous immunity from State interference accorded to instrumentalities of the Federal Government, that for instrumentalities of interstate commerce was at first given a very broad scope. Before the Twentieth Century culmination of the Industrial Revolution did so much

to replace strong local prejudice with a sense of single national community, closely linked by rapid and inexpensive communication devices, the principle developed that all State taxes on instrumentalities of interstate commerce were *ipso facto* burdens and, therefore, bad, even though local commerce was equally subjected to the burdens and though, in actual application, there were no possibilities of discrimination in favor of local against interstate commerce. Thus, decisions were hammered out, and firmly welded by the doctrine of *stare decisis*, that forbade, and presumably still forbid, the direct imposition by a State of a tax on the privilege of doing business where the business involved is solely interstate commerce. E. g. *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602.

Under the economic circumstances at the time the leading cases were developed, it was no doubt a desirable constitutional interpretation which would foster interstate commerce even at the expense of local commerce. Since the time of these decisions, however, the economic objectives underlying the decisions have been largely accomplished, and this Court has come to realize the inequity inherent in freeing interstate commerce from obligations which competing local commerce must assume. Thus, in recent years, the Court has several times announced that it is not the purpose of the interstate commerce clause to foster discrimination in favor of interstate commerce. See *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 46; *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 349. In the present case, it is manifest that, were Appellant's contentions adopted, a discrimination against Maryland vendors would surely result. If Appellant can sell in the Maryland market without collecting use taxes, it enjoys an obvious competitive advantage

over those vendors who must collect. Indeed, this Court, in accordance with economic verities, no longer regards the American economy as comprised of two antagonistic and competing systems, local commerce on one hand, and interstate commerce on the other. Rather, it now realizes that the two together combine to form an integrated economic pattern.

In order to keep its decisions in harmony with the economic developments which have so transformed the American scene, this Honorable Court has discarded the earlier approach of blanket invalidation of all State regulation, in favor of a technique which permits, to the greatest extent compatible with preservation of the desirable factor of continuity through *stare decisis*, State regulation demonstrably not violating the fundamental objectives of the commerce clause. A most similar and corresponding treatment for the exemption from State regulation of instrumentalities of the United States has developed. Compare *Alabama v. King & Boozer*, 314 U. S. 1. Limited, to a considerable extent, by the fully developed line of cases prohibiting taxes directly upon instrumentalities of interstate commerce, the Court has built two avenues of departure from those authorities so that it can uphold statutes which impose upon interstate commerce its rightful and nondiscriminatory portion of the obligations of our present highly developed, closely integrated, commercial and industrial system.

The facts of the present case not only logically fit both avenues of escape, but, in addition, present a situation indistinguishable from prior cases in which those two avenues have in fact been employed.

The first such avenue is the upholding of statutes which place obligations upon instrumentalities of interstate commerce where the precise incident of taxation is local rather than interstate in character. See *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80. The leading case employing this device is *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33. That case upheld a sales tax upon an interstate transaction and the requirement of collection of that tax by an interstate vendor because an incident of taxation was the delivery in the taxing State, an act characterized as local. In the present controversy, it is that very local incident, delivery, to which is attached the duty the State of Maryland imposes on Appellant. The duty is identical to that involved in the *Berwind-White* case. Appellant, faced with the obvious necessity of distinguishing that case, seeks to do so on the grounds that, while the Court's opinion speaks merely of delivery as the incident, in fact a great deal more is required, and points to other local aspects present in that case, such as the maintenance of an office by the vendor in the taxing State. We respectfully submit, however, that such a distinction on quantitative grounds is not correct. In the case of *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, this Court sustained a use tax on property constantly employed in interstate commerce except during the fragment of time between one such employment and another. The property was purchased in an interstate sale, was delivered to the purchaser in interstate commerce and immediately upon receipt was employed by the purchaser in interstate activities. The Court found the moment of rest between delivery and application a sufficient local incident to sustain the tax. Compare *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, where delivery activities of a similar magnitude with Appellant's

were assumed to be a sufficient local incident to support a non-discriminatory State tax.

Rather, the basis for limiting the "local incident" technique for sustaining State statutes is that suggested in *Nippert v. Richmond*, 327 U. S. 416. As is there pointed out, an ingenious draftsman can always find a local incident on which to base his tax or other obligation, but his success will depend upon whether the statute he draws operates in such a way that its effect upon interstate commerce is in no way detrimental as compared with its effect upon local commerce.

In the present case, there is no question of discrimination in favor of the Maryland merchants with whom Appellant is in competition. Every Maryland merchant, by the terms of the Retail Sales and Use Tax Acts, must act as the State tax collector either of a use tax, or of a sales tax, equal in amount to the tax required to be collected by Appellant. See *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, at page 364:

> "Nor is the mode of enforcing the tax on the privileges of these Iowa transactions any discrimination against interstate commerce. As we have seen, the use tax and the sales tax are complementary. Sales made wholly within Iowa carry the same burden as these mail order sales. A tax or other burden obviously does not discriminate against interstate commerce where 'equality is its theme'."

In view of the credit provisions of Section 370(d) of Article 81 of the Annotated Code of Maryland (1951 Edition) (see Statement of Statutes Involved, at page 2 hereof), there is no possibility of discrimination by reason of multiple state taxation.

Nor can it be said that on any absolute standard, regardless of comparison with local merchants, the imposition of the duty to collect the Maryland use taxes burdens interstate commerce. This follows inevitably from the decisions in *Henneford v. Silas Mason Co.*, 300 U. S. 577, and *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, which sustain use taxes on goods sold and transported in interstate commerce. Appellant acknowledges the validity of the use tax on the property sold by it to Maryland residents but claims, nevertheless, that requirement of collection by it burdens interstate commerce. However, the effect on interstate commerce is altogether identical whether the tax collecting duty is placed upon a local or upon a non-local vendor. In either event, the cost in the market place is the same. In *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, it was held that a vendor located and doing business in a State imposing a use tax could constitutionally be required to collect use tax on goods sold by it even though the sale was one in interstate commerce. The holding in that case was extended to a wholly non-local vendor in *General Trading Co. v. State Tax Comm. of Iowa*, 322 U. S. 335.

Indeed, upon sober reflection, the conclusion is inescapable that, while Appellant casts its argument in terms of a plea *against* burdening interstate commerce, the result it seeks would inevitably create a burden on such commerce. There are numerous Maryland vendors, engaging in interstate commerce, who must act as collectors of use tax in connection with interstate sales. To cite but one obvious example, there are mail order houses operating retail outlets in Maryland which, in view of the decisions in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, and *Nelson v. Montgomery Ward & Co., Inc.*, 312 U. S. 373, collect Maryland use tax on orders sent by Maryland residents to

their places of business outside the State and filled by mail or common carrier from places outside the State. If Appellant can, in effect, enjoy a two percent price margin advantage over these mail order houses on every sale it makes in the Maryland market, the interstate commerce carried on by the mail order houses is unfairly burdened by the existence of such a discriminiation.

Thus, there is every reason and adequate authority for employing the "local incident" avenue in the present case to affirm the decision of the court below. It should be noted that this avenue is open even if Appellant's characterization of Maryland's imposition as a direct tax on it is accepted. Compare *Southern Pacific Co. v. Gallagher*, 306 U. S. 167.

The other avenue developed by this Court for avoiding the verbally logical consequences of the cases which forbid a non-discriminatory tax directly on instrumentalities of interstate commerce is the recognition that impositions other than taxes should each be individually scrutinized to determine whether they, in fact, create an onus of the sort intended to be discouraged by the commerce clause. As to them, this Honorable Court has refused to adopt a *per se* rule such as the one which makes all taxes automatically burdens on interstate commerce. As an illustration of what is meant, it has been consistently ruled that the mere solicitation of orders by traveling salesmen, where the orders must be accepted at the home office outside the State, is interstate commerce. See, e.g. *Norton Co. v. Department of Revenue*, 340 U. S. 534, 537. Taxes levied on the privilege of conducting such activities have been regularly struck down. The cases doing so are collected in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S.

33, 56, footnote 11. Cf. *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389. Nevertheless, companies selling by use of such agents have been held to be subject to a requirement that they collect use taxes for the State in which the salesmen operate. *General Trading Co. v. State Tax Comm. of Iowa*, 322 U. S. 335; *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62.

This Court in those cases examined the tax collecting onus and determined that it was not of sufficient stature to justify classification as a burden on interstate commerce. It is interesting to note that in the analogous field of State statutory impingement upon Federal instrumentalities, it has been held that a State may require a national bank to collect from its depositors a tax which would have been unconstitutional had it been levied against the bank itself. *Colorado National Bank of Denver v. Bedford*, 310 U. S. 41. It is significant that the Court was influenced by the provision in the State statute for compensation to the bank for its collecting activities, amounting to three percent of all collections. An identical provision is contained in Section 384 of Article 81 of the Annotated Code of Maryland (1951 Edition) (Appellant's Brief and Appendix page 39).

In the present case, even if, despite the holding in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, delivery in Appellant's trucks to the homes and places of business of the Maryland purchasers were deemed activities purely interstate in character, still the principles of *General Trading Co. v. State Tax Comm. of Iowa*, 322 U. S. 335, would surely validate Maryland's imposition of the tax collecting duty, at least with respect to goods delivered in Appellant's own vehicles. There, the vendor's only activity in the State was solicitation through salesmen of orders forwarded out of the State for acceptance. To im-

pose the tax collecting duty with relation to the delivery of the very goods to which the tax applies certainly creates no greater onus than to rest the tax collecting duty upon generalized solicitation in the State. This is especially true where combined with the delivery are substantial acts of generalized solicitation through advertising by radio, television, newspaper and the mails. In *Nelson v. Montgomery Ward & Co. Inc.*, 312 U. S. 373, it was held that advertising in a State was of itself a sufficient activity to support the imposition of the use tax collecting duty with respect to interstate sales in which delivery was accomplished by mailing from a point outside the State. Certainly, no basis of distinction, constitutional in stature, can lie in the fact that the newspapers carrying the advertisements were published in Delaware, or that the radio and television broadcasts emanated from stations in Delaware, or that the mail advertising was posted in Delaware. The impact from such media derives from the circulation, not from the act of publishing, broadcasting or mailing. The circulation in Maryland was substantial and intended.

In so far as collection of the tax on goods delivered by common carrier is concerned, we, like the Appellant, fail to see any basis of distinction of a constitutional sort, whether goods are delivered in the vehicles owned by Appellant or whether delivery occurs through resort to a common carrier whose charges are borne by Appellant. On pages 23 and 24 of Appellant's Brief, it is argued that the constitutional result should be the same in either case. In this, at least, we heartily concur.

But, in any event, it is not necessary that we satisfy the Court of the substantial identity of the two situations. Let us assume that there is a difference. Let us further assume that it would be unconstitutional to require collection of

the tax if the only activity in Maryland by Appellant were delivery by a common carrier. Even so, in this particular case, imposition of the duty with respect to goods delivered by common carrier would be constitutionally proper. In *Nelson v. Sears, Roebuck and Co.*, 312 U. S. 359, and *Nelson v. Montgomery Ward and Co., Inc.*, 312 U. S. 373, the right to require collection of use tax was upheld with respect to goods mailed or shipped by common carrier from without the State, on unsolicited orders sent by the purchasers to a place of business of the vendor located in another State. The vendor conducted other business within the State, namely, the maintenance of retail outlets, and it was held proper to combine the mail order business with the other business over which the State clearly had control to determine the total amount of business conducted within the State. In this case, the business conducted in this State through delivery in vehicles owned by Appellant clearly is within the State's control. Since this is so, under the *Sears, Roebuck* and *Montgomery Ward* cases, the State may place on such business subject to its control the additional requirement of collection of use taxes on the business in which delivery by common carrier takes place in Maryland. Furthermore, in the *Montgomery Ward* case, it was held that, independently of the retail outlets in the State, advertising activity by the vendor in the State justified requirement of tax collection with respect to goods sent by common carrier or mail from without the State.

With respect to goods for which delivery is accomplished by transfer at the Delaware place of business to the purchaser, we wish to disclaim any intent on our part to argue that the duty of use tax collection can be imposed where, at the time of purchase and delivery, it is not known to the vendor that the goods are purchased for use, storage

or consumption in the State of Maryland. Such a contention, we acknowledge, would run foul of the Constitution. Primarily, it would do so, however, on due process grounds. It would do so on commerce clause grounds only in the secondary sense that to infringe the due process clause in dealings with an instrumentality of interstate commerce is of itself to place a burden on interstate commerce. That the commerce clause would not be directly violated by a requirement of use tax collection even in the extreme case where the vendor did not know that the goods were destined for Maryland is indicated by the opinion in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, at pages 364 and 365, where it is suggested that, in the case of vendors conducting no activities in the State in which the purchasers reside, the inability of the State to require use tax collection springs not from commerce clause prohibition but from the impotence of the State to reach the vendor, the absence of anything on which the State could act. Cf. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, at page 444. In the present case, however, the deliveries which took place at Appellant's store in Wilmington, Delaware, all were ones as to which, in the State's understanding of the matter at least, there was knowledge on the part of the Appellant that the goods were to be used, consumed or stored in Maryland. We believe that the Agreed Statement of Facts filed in this matter, properly read, reveals this fact. See paragraphs 4 and 5 thereof (R. 12). In any event, to the extent that it does not, we disclaim any case or controversy as to the duty to collect taxes on goods picked up by the purchasers in Wilmington where their destination was unknown to Appellant. We concede that the duty could not in such a situation constitutionally be required.

As for deliveries to the purchasers in Delaware where it was known to Appellant that the goods would be used, stored or consumed in Maryland, however, we submit that the rules developed in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, and *Nelson v. Montgomery Ward & Co., Inc.*, 312 U. S. 373, sustain imposition of the tax collecting duty. In those cases, delivery was by mail or common carrier, presumably, in some instances at least, at the expense of the purchaser. In such cases, delivery equally took place outside the State. We suggest that the factor of importance is the knowledge of the vendor that the goods were destined for use in a State which, by reason of other sales by the vendor, had sufficient contacts to require tax collection.

Thus, it can be seen that in no circumstances does the onus of tax collection here imposed on Appellant assume the proportions of a burden on interstate commerce. It should be mentioned that there is nothing inconsistent with the cases cited by us to be found in *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327. That case concerned a vendor whose activities in the State which required tax collection were identical with those of the vendor in the companion case of *General Trading Co. v. State Tax Comm. of Iowa*, 322 U. S. 335. This Court held that collection of the tax concerned was improperly demanded, but only on the grounds that the tax itself was bad, not that the pressing of the vendor into service as a collector was unconstitutional. The tax involved was a sales tax, and it was held that there was no local, non-interstate aspect of the sale within the taxing state. Hence, the tax was bad under the principles of the well established line of cases culminating in *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602. In the present case, as in *General Trading Co. v. State Tax Comm. of Iowa*, 322 U. S. 335, the tax involved is a use

tax, which Appellant acknowledges the State of Maryland may properly levy with respect to the goods here involved. As in the *General Trading Co.* case, therefore, the demand that Appellant collect the tax is constitutionally proper.

It may be said of *McLeod v. J. E. Dilworth Co., supra,* that the Court regarded the incident of tax, the sale, as outside the State's jurisdiction. At 322 U. S., page 330, it is said:

> "* * * in this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale — the transfer of ownership — was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."

Thus, it may be supposed that, while *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, was decided under the commerce clause, it primarily is a due process case, blood brother to such cases as *Frick v. Pennsylvania,* 268 U. S. 473, and *Treichler v. Wisconsin,* 338 U. S. 251, which strike down taxes levied against transfers of property not situated in the taxing State, on the ground that their levying violates the due process clause. Since use of the goods here concerned is what is taxed, and since that use clearly occurs in Maryland, the case of *McLeod v. J. E. Dilworth Co.,* 322 U. S. 327, is of little relevance.

II.

The Requirement that Appellant Collect Use Tax for the State of Maryland in no way Violates the Due Process Clause of the Fourteenth Amendment to the Constitution.

Since the decision of *International Shoe Co. v. Washington,* 326 U. S. 310, it is manifest that, without violation of the due process clause, a State may let the impact of its

laws be felt by anyone who conducts activities within the State which are reasonably related to the laws involved. The fact that a corporation such as Appellant, is not "doing business", in the traditional sense, does not render it immune from State regulation of such activities as it does conduct within a State's borders. Here, we are concerned with activities of Appellant designed to enter and tap the market created under, protected by, and existing because of the laws of the State of Maryland. The obligation here enforced against Appellant grows out of and is solely concerned with such activities. The contacts of Appellant with the State, therefore, bear an intimate relation to the duty imposed upon it. The decision in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, that delivery at the end of an interstate movement is an item local in character fully establishes that, from a due process point of view, the State is justified in using such delivery as a fulcrum in establishing obligations under its laws. As to the very goods delivered in Maryland, in Appellant's vehicles or in common carrier paid by Appellant, that the Maryland Use Tax Act, in its application to Appellant, satisfied the requirements of due process seems evident.

As for those cases where delivery took place outside of Maryland, again we concede the State's inability to require collection of the tax unless the vendor knew that Maryland was the destination of the goods. In cases where the vendor did know, however, the necessary contact with Maryland need not be identified by looking at the individual transactions themselves alone. As it is sometimes the case in mathematics that problems cannot be solved by partial differentiation merely, but will yield only to integration, so here one must look at the overall business contacts of Appellant with the State of Maryland. When that is done,

it is evident that the delivery and advertising activities in Maryland are sufficient contact to make it fair and reasonable to require collection of the use tax not only on the goods delivered in Maryland but also those delivered in Delaware when it was known to Appellant that they would be taken to Maryland. It was this very approach which was employed by this Court in the cases of *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson v. Montgomery Ward & Co., Inc.*, 312 U. S. 373; and *General Trading Co. v. State Tax Comm. of Iowa*, 322 U. S. 335, to sustain a requirement of use tax collection on goods delivered by the vendor at a point beyond the borders of the State.

CONCLUSION

Having discussed the legal authorities which bear on the question presented, in conclusion we should like to call this Honorable Court's attention to one factor which falls more into the field of consequences of decision and thus focuses on what will come after, rather than what has gone before, this case. Should Appellant prevail in its contentions, it, in Wilmington, will be able to sell a table, advertised by it as costing $99.95, to a Maryland purchaser for an immediate cash outlay by the purchaser of $99.95. An identical table manufactured in the same place and advertised for the same price of $99.95 by a Maryland vendor in Elkton, Maryland, twenty miles away, can be acquired by the purchaser only upon an immediate cash outlay of $101.95 ($99.95 plus sales tax of two percent). Of course, in theory, the Maryland purchaser from Appellant is liable to pay two percent in taxes to the State. In practice, however, it can be said that most, if not all, such tax obligations are ignored. Only through collection by the vendor at time of sale can sales and use taxes be efficiently administered. Appellant, in its brief, makes much of the sup-

posed inconvenience to it of collecting taxes on goods sold to Maryland residents. However, for that inconvenience the State of Maryland will adequately compensate Appellant by permitting retention of three percent of collections. Although its Brief is silent on the point, what Appellant really hopes to preserve is the obvious competitive advantage *in the Maryland market* over Maryland merchants who must, through their general tax burden, primarily provide the funds through which the State in its police power makes possible that very market. That competitive advantage derives solely from tax evasion. Of course, we do not mean to imply that Appellant in any way encourages such tax evasion by Maryland purchasers. Appellant need not do so, for the evasion is prevalent enough without encouragement. However, Appellant is well aware of its existence and is anxious for its continuance. We strongly urge this Honorable Court that the commerce clause of the Constitution did not have as a purpose the encouragement of tax evasion. As the statute of frauds is not permitted itself to be the vehicle of frauds, so too, we suggest, tax evasion, the continuance of which is really Appellant's purpose, should not be countenanced in the name of encouragement of interstate commerce. The tax involved is legally due and payable although the property is transported in interstate commerce. It will not adversely affect interstate commerce for Appellant to collect that tax. It will prevent evasion for Appellant to do so. As was said in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359 at p. 366, Appellant

> "is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa (Maryland) residents, or to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid."

We believe, therefore, that the superiority of the result we argue for over the result which Appellant seeks is manifest and that, therefore, even in the absence of the clear authorities supporting our position, ours is the correct position and the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

EDWARD D. E. ROLLINS,
Attorney General,

J. EDGAR HARVEY,
Deputy Attorney General,

FRANCIS D. MURNAGHAN, JR.,
Asst. Attorney General,

Attorneys for Appellee,
1201 Mathieson Building,
Baltimore 2, Maryland.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

PETITION FOR REHEARING

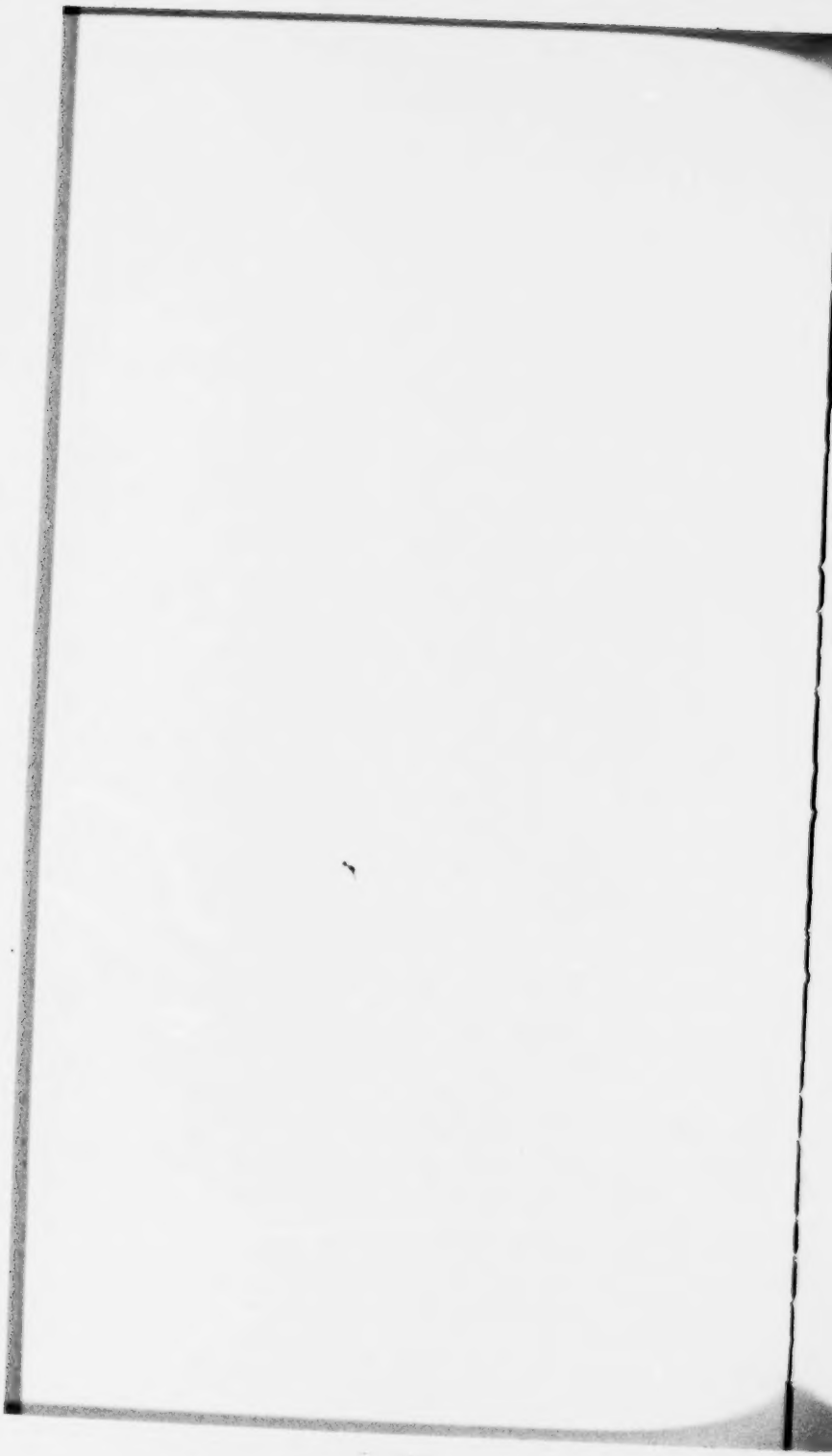
EDWARD D. E. ROLLINS,
Attorney General,

J. EDGAR HARVEY,
Deputy Attorney General,

FRANCIS D. MURNAGHAN, JR.,
Asst. Attorney General,

Counsel for Petitioner,
State of Maryland.

The Daily Record Co., Baltimore 3, Md.



BLEED THROUGH

INDEX

Table of Contents

Table of Citations

Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

PETITION FOR REHEARING

Petitioner, State of Maryland, prays that this Court grant a rehearing of its judgment of April 5, 1954, reversing and remanding the judgment of the Court of Appeals of Maryland.

REASONS FOR GRANTING REHEARING

(1) The majority opinion of April 5, 1954, reaches the conclusion that Maryland's attempt to require Miller Brothers Company to act as its use tax collector was an appropriation of jurisdiction over matters over which the State of Delaware, rather than Maryland, has authority

and "that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax". The opinion suggests, and logically requires, the conclusion that Delaware would have jurisdiction to require use or sales tax collection by Miller Brothers Company with regard to the transactions about which this case is concerned. *In fact, with regard to the bulk of such transactions, namely, those where delivery of the goods sold took place in Maryland, no such jurisdiction in Delaware can exist.* That State manifestly could not tax use of the goods since use would occur only in Maryland. Similarly, since a sale of goods in one State for delivery in another is interstate commerce, a Delaware tax upon the sale would be bad. See *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292; *McLeod v. Dilworth Company*, 322 U. S. 327. Compare Rutledge (J.) concurring in *General Trading Company v. State Tax Commission of Iowa*, 322 U. S. 335, and dissenting in *McLeod v. Dilworth Company*, 322 U. S. 327, at 322 U. S., page 361.

Thus, as to the bulk of the transactions here involved, there was no invasion by Maryland of a jurisdiction of Delaware, for Delaware could have levied neither a sales nor a use tax with regard to those transactions, and, therefore, could have required no tax collection by Miller Brothers Company.

(2) It does not perhaps, of necessity, follow that, because Delaware had no jurisdiction in the matter, Maryland must have jurisdiction. Nevertheless, they are the only two States concerned. Where it can be shown that one of two possible States can have no jurisdiction in the matter, exercise of jurisdiction by the other manifestly is less likely to result in unjust consequences violating basic principles of fairness embodied in the due process clause.

This Court has demonstrated, in a closely analogous situation, that the impracticality or impossibility of supervision of a transaction by a State whose contacts with the actor are the most substantial will be an operative consideration in permitting a State, possessing little contact with the actor but primarily concerned with the impact of its actions, to exercise jurisdiction in the matter. *Travelers Health Association v. Virginia,* 339 U. S. 643.

(3) Since Delaware, despite its many contacts with Miller Brothers Company, has no jurisdiction to require sales or use tax collection by it with regard to the transactions here involved, the Court is presented with the alternatives of (1) allowing Maryland to exercise the jurisdiction, or (2) of saying that no State shall exercise it. If the present judgment of this Honorable Court stands, it means the latter alternative has been chosen. Its consequences, where both States involved have sales and use taxes, would be incongruous enough to raise substantial doubt that they should properly be ascribed to the due process clause. The situation to which we refer presently exists in Maryland and the District of Columbia. Both have sales taxes and compensating use taxes. If neither can require vendors located in the other who make sales to its residents, completed by delivery, to collect use taxes, it means that Maryland buyers will flock to the District of Columbia department stores while the District consuming public will concentrate its buying in Silver Spring and other commercial areas of Maryland. Admittedly, collection of sales and use taxes is efficient only when performed by the vendor. Therefore, the situation will exist where, *not for commerce clause reasons* but solely on due process grounds, many transactions will be altogether exempt from the requirement of tax collection by the vendor, and, hence, as a prac-

tical matter, from tax, although both of the two jurisdictions concerned would wish the requirement to extend to all transactions. A jurisdictional vacuum of this nature is hardly a consummation devoutly to be wished.

(4) To state our position somewhat differently, we feel the opinion of the Court errs in ascribing lack of jurisdiction by Maryland to the fact that the sales involved were entirely Delaware sales. Where a sale involves delivery from one State to another, it traditionally has been deemed interstate. It is impossible to say, without a complete contradiction in terms, that all contacts with an *interstate* sale are had by *only one* of the two States. Thus, either Maryland has substantial contacts with the sale justifying its jurisdiction to impose so intimately related a duty as that of tax collection, or else hereafter sales involving delivery from one State to another are to be regarded as local not interstate. In that event, the State of origin will be justified in levying a sales tax against the transaction. This consequence of the Court's opinion in the present case will be so radical a departure from the generally accepted and applied principles of sales and use tax law that we respectfully submit reargument should be permitted, particularly since such a possible consequence was in no way conceived of or alluded to in the briefs and oral arguments presented to this Honorable Court by the parties.

(5) Finally, the opinion of April 5, 1954, distinguishes "the nearest support for Maryland's position", *General Trading Co. v. State Tax Commission*, 322 U. S. 335, on the grounds that the state of destination there had much more substantial contacts, "the only nonlocal phase of the total sale being acceptance of the order". Yet, the *General Trading Co.* case presented a transaction altogether identical

with that concerned in its companion case, *McLeod v. Dilworth Co.*, 322 U. S. 327, where the Court determined that the transaction was completed in the state of origin, saying at page 330:

> "* * * the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale — the transfer of ownership — was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries. * * *"

We submit that such contemporaneous characterization of the factual situation in the *General Trading Co.* case is more pertinent to the determination of the quantum of contact deemed necessary by the Court for the state of destination to impose the use tax collecting duty, than the contrary characterization presently ascribed to it by this Honorable Court.

CONCLUSION

For the reasons set forth above, it is respectfully urged that rehearing be granted.

Respectfully submitted,

EDWARD D. E. ROLLINS,
Attorney General,

J. EDGAR HARVEY,
Deputy Attorney General,

FRANCIS D. MURNAGHAN, JR.,
Asst. Attorney General,

Counsel for Petitioner,
State of Maryland.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

FRANCIS D. MURNAGHAN, JR.,
Asst. Attorney General,
Of Counsel for Petitioner,
State of Maryland.

SUPREME COURT OF THE UNITED STATES

No. 160.—October Term, 1953.

Miller Brothers Company, Appellant, *v.* State of Maryland.	On Appeal From the Court of Appeals of Maryland.

[April 5, 1954.]

Mr. Justice Jackson delivered the opinion of the Court.

Appellant is a Delaware merchandising corporation which only sells directly to customers at its store in Wilmington, Delaware. It does not take orders by mail or telephone. Residents of nearby Maryland come to its store and make purchases, some of which they carry away, some are delivered to them in Maryland by common carrier, and others by appellant's own truck. Maryland lays upon its residents an excise tax on "the use, storage or consumption" in the State of such articles,[1] and it requires every vendor to collect and remit the tax to the State.[2] This the appellant did not do. Finding appellant's truck in Maryland, the State seized it, and the State's highest court has held it liable for the use tax on all goods sold in the Delaware store to Maryland residents, however delivered.[3] This was against appellant's timely contention that the Maryland taxing act, so construed, conflicts with the federal commerce power and attempts to extend the power of the State beyond its borders in violation of the Due Process Clause of the Fourteenth Amendment. The parties have stipulated facts in detail, and, so far as they seem important, we set them forth in the Appendix.[4]

[1] All footnotes to this opinion are carried in an Appendix.

The grounds advanced by Maryland for holding the Delaware vendor liable come to this: (1) the vendor's advertising with Delaware papers and radio stations, though not especially directed to Maryland inhabitants, reached, and was known to reach, their notice; (2) its occasional sales circulars mailed to all former customers included customers in Maryland; (3) it delivered some purchases to common carriers consigned to Maryland addresses; (4) it delivered other purchases by its own vehicles to Maryland locations. The question is whether these factors, separately or in the aggregate, in each or all of the above types of sales, establish a state's power to impose a duty upon such an out-of-state merchant to collect and remit a purchaser's use tax.

It is a venerable if trite observation that seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law. "No principle is better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction." *New York, L. E. & W. R. Co.* v. *Pennsylvania,* 153 U. S. 628, 646. "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action." *St. Louis* v. *Ferry Co.,* 11 Wall. 423, 430.

But visible territorial boundaries do not always establish the limits of a state's taxing power or jurisdiction. In the last twenty years, revenue needs have come to

exceed the demands that legislatures feel it expedient to make upon accumulated wealth or property with fixed location within the state. The states therefore have turned to taxing activities connected with the movement of commerce, such as exchange and consumption. If there is some jurisdictional fact or event to serve as a conductor, the reach of the state's taxing power may be carried to objects of taxation beyond its borders. When it has the taxpayer within its power or jurisdiction, it may sometimes, through him, reach his extraterritorial income or transactions. On the other hand, if it has jurisdiction of his taxable property or transactions, it may sometimes, through these, reach the nonresident. Whether this is one of these cases we must inquire.

We are dealing with a relatively new and experimental form of taxation.[5] Taxation of sales or purchases and taxation of use or possession of purchases are complementary and related but serve very different purposes. The former, a fiscal measure of considerable importance, has the effect of increasing the cost to the consumer of acquiring supplies in the taxing state. The use tax, not in itself a relatively significant revenue producer,[6] usually appears as a support to the sales tax in two respects. One is protection of the state's revenues by taking away from inhabitants the advantages of resort to untaxed out-of-state purchases. The other is protection of local merchants against out-of-state competition from those who may be enabled by lower tax burdens to offer lower prices. In this respect, the use tax has the same effect as a protective tariff becoming due not on purchase of the goods but at the moment of bringing them into the taxing states.[7] The collection of the use tax from inhabitants is a difficult administrative problem, and if out-of-state vendors can be compelled to collect it and remit it to the taxing state, it simplifies administration. But this raises questions of great importance to particu-

lar taxpayers, to the course of commercial dealing among the states and as to appropriation by other states of tax resources properly belonging to the state where the event occurs.

The practical and legal effect of the Maryland statute as it has been applied to this Delaware vendor is to make the vendor liable for a use tax due from the purchaser. In economic consequence, it is identical with making him pay a sales tax. The liability arises only because of a Delaware sale and is measured by its proceeds. But at the time of the sale, no one is liable for a Maryland use tax. That liability arises only upon importation of the merchandise to the taxing state, an event which occurs after the sale is complete and one as to which the vendor may have no control or even knowledge, at least as to merchandise carried away by the buyer. The consequence is that liability against the Delaware vendor is predicated upon use of the goods in another state and by another person. We do not understand the State to contend that it could lay a use tax upon mere possession of goods in transit by a carrier or vendor upon entering the State, nor do we see how such a tax could be consistent with the Commerce Clause.

The question here is whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability. Despite the increasing frequency with which the question arises, little constructive discussion can be found in responsible commentary as to the grounds on which to rest a state's power to reach extraterritorial transactions or nonresidents with tax liabilities. Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. A few have

been specifically overruled, while others no longer fully represent the present state of the law. But the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.

Thus, the Court has frequently held that domicile or residence, more substantial than mere presence in transit or sojourn, is an adequate basis for taxation, including income,[8] property,[9] and death [10] taxes. Since the Fourteenth Amendment makes one a citizen of the state wherein he resides, the fact of residence creates universally recognized reciprocal duties of protection by the state and of allegiance and support by the citizen. The latter obviously includes a duty to pay taxes, and their nature and measure is largely a political matter. Of course, the situs of property may tax it regardless of the citizenship, domicile or residence of the owner, the most obvious illustration being a tax on realty laid by the state in which the realty is located.[11] Also, the keeping of tangible [12] or intangible [13] personalty within a state may give it a similar taxable situs there (sometimes called a business or commercial situs or domicile). Certain activities or transactions carried on within a state, such as the use [14] and sale [15] of property may give jurisdiction to tax whomsoever engages therein, and the use of highways may subject the use to certain types of taxation.[16] These cases overlap with those in which incorporation by a state [17] or permission to do business there [18] forms the basis for proportionate taxation of a company, including its franchise, capital, income and property. Recent cases in which a taxable sale does not clearly take place within the taxing state, elements of the transaction occurring in different states, have presented peculiar difficulties,[19] as have those where the party liable for a use tax does not use the product within the taxing state.[20]

We are unable to find in any of our cases a precedent for sustaining the liability asserted by Maryland here. In accordance with the principles of earlier cases, it was recently settled that Maryland could not have reached this Delaware vendor with a sales tax on these sales. *McLeod* v. *Dilworth Co.*, 322 U. S. 327. Can she then make the same Delaware sales a basis for imposing on the vendor liability for use taxes due from her own inhabitants? It would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself.

The decisions relied upon by Maryland do not, in our view, support her. This is not the case of a merchant entering a state to maintain a branch and engaging in admittedly taxable retail business but trying to isolate some part of his total sales to nontaxable interstate commerce. Under these circumstances, the State has jurisdiction to tax the taxpayer, and all that he can question on Due Process or Commerce Clause grounds is the validity of the allocation. Cf. *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *Norton Co.* v. *Department of Revenue*, 340 U. S. 534.

The nearest support for Maryland's position is *General Trading Co.* v. *State Tax Comm'n*, 322 U. S. 335. The writer of this opinion dissented in that case and, whether or not in so doing he made a correct application of principles of jurisdiction to the particular facts, it is clear that circumstances absent here were there present to justify the Court's approval of liability for collecting the tax. That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a

mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market. That these inhabitants incurred a liability for the use tax when they used, stored or consumed the goods in Maryland, no one doubts. But the burden of collecting or paying their tax cannot be shifted to a foreign merchant in the absence of some jurisdictional basis not present here.

In this view of the case, we need not consider whether the statute imposes an unjustifiable burden upon interstate commerce.

The judgment appealed from is reversed and the case remanded for further proceedings not inconsistent herewith.

Reversed and remanded.

APPENDIX.

[1] The statute reads: "An excise tax is hereby levied and imposed on the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State on or after the effective date of this Act, for use, storage or consumption within this State. The tax imposed by this section shall be paid by the purchaser and shall be computed as follows: . . . ." Flack's Md. Ann. Code, 1951, Art. 81, § 369.

[2] "Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this sub-title, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser." Flack's Md. Ann. Code, 1951, Art. 81, § 371.

"As used in this sub-title, the following terms shall mean or include:

. . . . .

"(k) 'Engaged in business in this State' means the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State. This term shall include, but shall not be limited to the following acts or methods of transacting business.

"(1) The maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, of any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

"(2) The having of any representative, agent, salesman, canvasser, or solicitor operating in this State for the purpose of selling, delivering, or the taking of orders for any tangible personal property." Flack's Md. Ann. Code, Art. 81, § 368.

"Every vendor required or permitted to collect the tax shall collect the tax imposed by the provision of this sub-title, notwithstanding the following:

"(a) That the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the vendor at a point outside of this State as a result of solicitation by the vendor through the medium of a catalog or other written advertisement; or

"(b) That the purchaser's order or contract of sale made or closed by acceptance or approval outside of this State or before said tangible personal property enters this State; or

"(c) That the purchaser's order or contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this State and shipped directly to the purchaser from the point of origin; or

"(d) That said property is mailed to the purchaser in this State from a point outside this State or delivered to a carrier at a point outside this State, F. O. B., or otherwise, and directed to the vendor in this State, regardless of whether the cost of transportation is paid by the vendor or by the purchaser; or

"(e) That said property is delivered directly to the purchaser at a point outside this State, if it is intended to be brought to this State for use, storage or consumption in this State." Flack's Md. Ann. Code, Art. 81, § 373.

"The vendor and any other officer of any corporate vendor required or permitted to collect the tax imposed by this sub-title shall be personally liable for the tax collected, and such vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property and payable at the time of the sale. Any vendor who fails to collect the tax pursuant to this sub-title and the regulations prescribed hereunder shall, in addition to all other penalties, be personally liable to the State for the amount uncollected." Flack's Md. Ann. Code, 1951, Art. 81, § 375.

[3] *Miller Brothers Co.* v. *Maryland*, — Md. —, 95 A. 2d 286.

[4] "It is hereby stipulated and agreed by and between the attorneys for the above named parties and on their behalf that:

"1. Defendant, Miller Brothers Company, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Ninth and King Streets, Wilmington, Delaware. It has no resident agent in Maryland.

"2. Defendant is and for all times material to this suit has been engaged in the retail household furniture business by selling its merchandise from its only retail store located in Wilmington, Delaware.

"3. The only methods of advertising used by the Defendant are the following:

"(a) *Radio and Television.* The Defendant has engaged in no radio or television advertising of any sort, anywhere, since January 1, 1951. Prior to that date, the Defendant had limited radio ad-

vertising over the Wilmington, Delaware, stations. In the fall of 1950, for a period of about six weeks, the Defendant had a small amount of television advertising over Station WDEL–TV in connection with the broadcasting of football scores. The facilities of those stations are located in Delaware entirely. In the radio and television advertising the Defendant has never had any script or copy which made an appeal for out-of-state business or in any way was designed directly or indirectly to appeal particularly to Maryland residents. The radio slogan adopted by the Defendant was 'Furniture Fashion Makers for Delaware'.

"(b) *Newspapers.* The Defendant advertises regularly in the Wilmington Morning News and the Wilmington Journal every evening. It also advertises occasionally in the Wilmington Sunday Star. All of these newspapers are published in Wilmington and undoubtedly have some circulation in some portions of Maryland. The volume of such circulation is unknown to either the Plaintiff or the Defendant. In its newspaper advertising the Defendant has never used advertising copy which mentions Maryland customers or is prepared for the purpose of directly or indirectly making any special appeal to the Maryland customers. No advertising has ever been done by the Defendant in any newspapers published in Maryland.

"(c) *Use of the Mails.* The Defendant uses an automatic card mailing system and with this system distributes about four pieces a year. These mailing pieces go out to everyone who has purchased from the Defendant and whose name and address is on the Defendant's records. This means that Maryland residents do receive these mailing pieces, but no specific advertising copy has ever been sent through the mails for the specific purpose of attracting Maryland buyers. No advertising copy has been sent to Maryland buyers alone and the only advertising copy which these Maryland buyers receive is that which is sent to all customers whose names and addresses are on the records.

"4. Defendant has made and does make certain sales of tangible personal property, some of which sales being the subject matter of this action, to residents of the State of Maryland, who have used, consumed or stored or will use, consume or store the purchased personal property in the State of Maryland.

"5. The transactions between the Defendant and the said "Maryland purchasers are and have been as follows:

"(a) It is the Defendant's policy never to accept telephone orders. Most of the merchandise sold by the Defendant requires personal

inspection and selection, and it is for this reason that telephone orders are refused. The Defendant maintains no mail-order business and does not make use of coupons in connection with its newspaper advertising.

"(b) The purchaser appears at Defendant's retail store, located in Wilmington, Delaware. In about thirty per cent (30%) of the sales the exact item selected by the customer is tagged in the store and that same item is delivered to the customer from the store, in Wilmington, Delaware. In the remainder of the sales, an item identical to that selected by the customer is delivered from the Defendant's storeroom or warehouse in Wilmington, Delaware.

"(c) Delivery is made in one of three ways and no other:

"(1) The article is taken away by the purchaser. Within the taxable period of July 1, 1947, through December 31, 1951, tangible personal property sold for at least $2,500 was delivered in this manner.

"(2) The article is delivered in Maryland to the purchaser in a motor vehicle owned and operated by Defendant, directly from Defendant's store in Wilmington, Delaware, to the residence of the Maryland purchaser. The cost of the delivery in such a case is borne by Defendant and no charge therefor is made to the purchaser. Within the taxable period July 1, 1947, through December 31, 1951, tangible personal property sold for at least $8,000 was delivered in this manner.

"(3) The article is delivered in Maryland to the purchaser by common carrier to which delivery is made by Defendant in Wilmington, Delaware. Such common carrier is usually an independent trucking line authorized to do business as a commercial carrier by the Interstate Commerce Commission. The cost of the delivery in such a case is borne by the Defendant and no charge therefor is made to the purchaser. Within the taxable period July 1, 1947, through December 31, 1951, tangible personal property sold for at least $1,500 was delivered in this manner.

"6. (a) Payment for some purchases is completed at the time the purchaser appears at the Defendant's retail store and prior to the delivery.

"(b) The Defendant does make sales to some Maryland residents on credit in exactly the same way as it sells to Delaware residents on credit. In the case of most of such credit sales to Maryland customers, the Defendant enters into conditional sales contracts with its Maryland customers in the same way that it enters into conditional sales contracts with its Delaware customers. In many other

instances, the Defendant notes the terms of the credit transaction on the sales slip without requiring a conditional sales agreement, and this method of business is used without any distinction between Maryland and Delaware customers. This method is frequently designated as a 60 or 90-day charge account. At no time within the past eight years has the Defendant ever recorded its conditional sales contracts in Maryland.

"(c) The Defendant has never repossessed by legal process any furniture or other merchandise for any customers in Maryland or elsewhere within the last fifteen years. The Defendant has on occasion accepted back merchandise which has not been satisfactory to the customer. In the event of delinquency in payments, the Defendant uses collection letters, which are sent through the mails. During the past ten years the Defendant has never instituted legal action through a Magistrate's or other Court in Maryland, nor has it in that period used a collection agent in Maryland. The Defendant employs no collectors. The Maryland customers make payments to the Defendant personally at the store in Wilmington, Delaware, or by check, cash or money order sent through the mails.

"(d) No C. O. D. deliveries are made.

"7. Except to the extent, if any, disclosed above, Defendant does not maintain, occupy or use, nor has it ever in the past maintained, occupied or used, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, any office, branch, place of distribution, sales or sample rooms or place, warehouse or storage place, or other place of business in the State of Maryland.

"8. Except to the extent, if any, disclosed above, Defendant does not have, nor has it ever had, any representative, agent, salesman, canvasser or solicitor operating in the State of Maryland for the purpose of selling or taking any orders for tangible personal property, or delivering the same.

"9. Defendant is not, nor has it ever been, qualified or registered to do business in the State of Maryland.

"10. On or about March 10, 1952, the Comptroller of the State of Maryland assessed a deficiency in Use Tax against the Defendant in the amount of $356.40, $240.00 thereof representing the use tax claimed to be due, $32.40 thereof as interest claimed to be due and $84.00 thereof as a penalty claimed to be due for the tax period from July 1, 1947, through December 31, 1951, based upon all the sales referred to in paragraph 5 above.

"11. Defendant has not applied for a permit nor been authorized

by the Comptroller to collect any use tax under Section 312 of Article 81 of the Annotated Code of Maryland (1947 Supp.).

"12. Defendant has not applied for, nor paid the license fee required to obtain, nor has been issued, a license pursuant to Sections 331–333 of Article 81 of the Annotated Code of Maryland (1947 Supp.).

"13. Except as indicated above, Defendant does not engage and has not engaged in any activities in the State of Maryland."

[5] Criz, The Use Tax, 1 (Public Administration Service No. 78, 1941); Hellerstein, State and Local Taxation, 4–12, 338; Haig and Shoup, The Sales Tax in the American States, 83 (1934).

[6] Criz, *supra*, at 3–4, 36–39. For an example of the revenue features in a particular state, see McLees, The Use Tax After One Year, 4 Ark. L. Rev. 337, 339 (1950).

[7] Criz, *supra*, at 1–2; Hellerstein, *supra*, at 116, 408–409, 418; Jacoby, Retail Sales Taxation, c. VI (1938).

[8] *Maguire* v. *Trefry*, 253 U. S. 12; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308; *Guaranty Trust Co.* v. *Virginia*, 305 U. S. 19.

The collection of cases in footnotes 8 through 20 is not intended as a guide to their holdings but only as an illustration of the types of jurisdictional standards sanctioned at one time or another by the Court.

[9] Most of these cases deal with intangible property and apply the maxim *mobilia sequuntur personam*. *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Darnell* v. *Indiana*, 226 U. S. 390; *Hawley* v. *City of Malden*, 232 U. S. 1; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; *Citizens National Bank* v. *Durr*, 257 U. S. 99; *Klein* v. *Board of Tax Supervisors*, 282 U. S. 19, 24; *Greenough* v. *Tax Assessors of Newport*, 331 U. S. 486. See *Nevada Bank* v. *Sedgwick*, 104 U. S. 111; *Bonaparte* v. *Tax Court*, 104 U. S. 592, 595; *Sturges* v. *Carter*, 114 U. S. 511, 521; *Dewey* v. *Des Moines*, 173 U. S. 193; *Kidd* v. *Alabama*, 188 U. S. 730, 731.

[10] *Blackstone* v. *Miller*, 188 U. S. 189; *Bullen* v. *Wisconsin*, 240 U. S. 625; *Blodgett* v. *Silberman*, 277 U. S. 1; *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312; *Curry* v. *McCanless*, 307 U. S. 357; *Graves* v. *Elliott*, 307 U. S. 383; *Graves* v. *Schmidlapp*, 315 U. S. 657; *Central Hanover Bank & Trust Co.* v. *Kelly*, 319 U. S. 94. See *Carpenter* v. *Pennsylvania*, 17 How. 456; *Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567; *Burnet* v. *Brooks*, 288 U. S. 378, 400–405. Cf. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292;

Pearson v. *McGraw*, 308 U. S. 313. See also *Keeney* v. *Comptroller of New York*, 222 U. S. 525, 537, which involved an excise tax on an *inter vivos* transfer of stocks and bonds.

[11] The Court has never had a case in which a state attempted a direct tax on land located in another state. See *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 204. Instead, the cases in point speak of the problem by way of dicta or deal with interests attached to the realty, such as incorporeal heriditaments. See *Witherspoon* v. *Duncan*, 4 Wall. 210; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319; *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421; *Paddell* v. *City of New York*, 211 U. S. 446; *First National Bank* v. *Maine*, 284 U. S. 312, 326; *Senior* v. *Braden*, 295 U. S. 422. Cf. *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Central R. Co.* v. *Jersey City*, 209 U. S. 473.

[12] *Coe* v. *Errol*, 116 U. S. 517, 524; *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 226–227; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70; *Union Refrigerator Transit Co.* v. *Lynch*, 177 U. S. 149; *Carstairs* v. *Cochran*, 193 U. S. 10; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299; *Hannis Distilling Co.* v. *Mayor and City Council*, 216 U. S. 285; *Johnson Oil Refining Co.* v. *Oklahoma ex rel. Mitchell*, 290 U. S. 158; *City Bank Farmers Trust Co.* v. *Schnader*, 293 U. S. 112; *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169. See *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Morgan* v. *Parham*, 16 Wall. 471; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 210–211; *Marye* v. *Baltimore & O. R. Co.*, 127 U. S. 117, 123; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 427–428; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 609, 613, 622 (bridge); *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82; *Fargo* v. *Hart*, 193 U. S. 490; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194; *Thompson* v. *Kentucky*, 209 U. S. 340, 347; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 371–372; *Wells, Fargo & Co.* v. *Nevada*, 248 U. S. 165, 167; *Union Tank Line Co.* v. *Wright*, 249 U. S. 275; *Frick* v. *Pennsylvania*, 268 U. S. 473; *Treichler* v. *Wisconsin*, 338 U. S. 251; *Standard Oil Co.* v. *Peck*, 342 U. S. 382. Whether the property is sufficiently situated in the state to become part of the general mass of taxable property or whether it is merely in transit is frequently treated as an interstate commerce question rather than a jurisdictional one. *E. g.*, *Brown* v. *Houston*, 114 U. S. 622, 632–633; *Pittsburg & Southern*

Coal Co. v. *Bates*, 156 U. S. 577, 588–589; *Kelley* v. *Rhoads*, 188 U. S. 1; *General Oil Co.* v. *Crain*, 209 U. S. 211; *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366. As to the situs of personalty within various counties of a single state, see *Columbus Southern R. Co.* v. *Wright*, 151 U. S. 470.

[13] *Tappan* v. *Merchants' National Bank*, 19 Wall. 490, 499–500; *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185; *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *State Board of Assessors* v. *Comptoir National D'Escompte*, 191 U. S. 388; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395; *Liverpool & London & Globe Ins. Co.* v. *Board of Assessors*, 221 U. S. 346; *Orient Ins. Co.* v. *Board of Assessors*, 221 U. S. 358; *Wheeler* v. *Sohmer*, 233 U. S. 434; *Rogers* v. *Hennepin County*, 240 U. S. 184; *Iowa* v. *Slimmer*, 248 U. S. 115; *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83; *Virginia* v. *Imperial Coal Sales Co.*, 293 U. S. 15; *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193; *New York ex rel. Whitney* v. *Graves*, 299 U. S. 366; *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234. See *Railroad Co.* v. *Jackson*, 7 Wall. 262; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171; *Scottish Union & National Ins. Co.* v. *Bowland*, 196 U. S. 611, 619–620; *Buck* v. *Beach*, 206 U. S. 392; *Selliger* v. *Kentucky*, 213 U. S. 200; *Brooke* v. *City of Norfolk*, 277 U. S. 27. Cf. *Board of Assessors* v. *New York Life Ins. Co.*, 216 U. S. 517, 523. In some of these cases, the property would appear to be tangible as well as intangible in nature.

[14] This is generally discussed as in interstate commerce question. *E. g.*, *Bowman* v. *Continental Oil Co.*, 256 U. S. 642; *Eastern Air Transport, Inc.* v. *South Carolina Tax Comm'n*, 285 U. S. 147; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472; *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249; *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86; *Henneford* v. *Silas Mason Co.*, 300 U. S. 577. See also footnote 20.

[15] *New York ex rel. Hatch* v. *Reardon*, 204 U. S. 152, 158–159. See *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62; *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327. Cf. *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506; *Graniteville Mfg. Co.* v. *Query*, 283 U. S. 376 (creation of promissory notes). See also footnote 19.

[16] *Kane* v. *New Jersey*, 242 U. S. 160; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352; *Hicklin* v. *Coney*, 290 U. S. 169. See *Hendrick* v. *Maryland*, 235 U. S. 610; *Clark* v. *Poor*, 274 U. S. 554. Cf. *Sprout* v. *South Bend*, 277 U. S. 163; *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583; *Bode* v. *Barrett*, 344 U. S. 583.

[17] *Society for Savings* v. *Coite*, 6 Wall. 607; *Delaware Railroad Tax*, 18 Wall. 206, 231; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *Corry* v. *Mayor and Council of Baltimore*, 196 U. S. 466; *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409; *New York ex rel. New York C. & H. R. R. Co.* v. *Miller*, 202 U. S. 584; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63; *Kansas City, F. S. & M. R. Co.* v. *Botkin*, 240 U. S. 227, 232, 235; *Kansas City, M. & B. R. Co.* v. *Stiles*, 242 U. S. 111, 118–119; *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U. S. 325; *Schwab* v. *Richardson*, 263 U. S. 88; *Matson Navigation Co.* v. *State Board of Equalization*, 297 U. S. 441; *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506, 514–516; *Newark Fire Ins. Co.* v. *State Board of Tax Appeals*, 307 U. S. 313; *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292. See *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 400–401; *Maxwell* v. *Bugbee*, 250 U. S. 525, 539–540; *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174. In many of these cases the company was also doing business in the state of incorporation.

[18] *State Railroad Tax Cases*, 92 U. S. 575, 603; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *St. Louis Southwestern R. Co.* v. *Arkansas*, 235 U. S. 350, 364; *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113; *Pullman Co.* v. *Richardson*, 261 U. S. 330; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271; *Great Northern R. Co.* v. *Minnesota*, 278 U. S. 503; *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 424–427; *Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22, 29–31; *Illinois Central R. Co.* v. *Minnesota*, 309 U. S. 157; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435; *International Harvester Co.* v. *Wisconsin Department of Taxation*, 322 U. S. 435; *International Harvester Co.* v. *Evatt*, 329 U. S. 416, 420–421; *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 667–668. See *Erie R. Co.* v. *Pennsylvania*, 21 Wall. 492; *Western Union Telegraph Co.* v. *Attorney General*, 125 U. S. 530, 548; *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217, 227–228; *Central Pacific R. Co.* v. *California*, 162 U. S. 91, 126; *Western Union Telegraph Co.* v. *Missouri ex rel. Gottlieb*, 190 U. S. 412; *Western Union Telegraph Co.* v. *Kansas ex rel. Coleman*, 216 U. S. 1, 30, 38; *Pullman Co.* v. *Kansas ex rel. Coleman*, 216 U. S. 56, 61–63; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, 162–163; *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280, 285; *Provident Savings Life Assurance Society* v. *Kentucky*, 239 U. S. 103; *Looney* v. *Crane Co.*, 245 U. S. 178, 187–188; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135; *Wallace* v. *Hines*, 253 U. S. 66; *Southern R. Co.* v. *Watts*, 260 U. S. 519, 527;

Baker v. *Druesedow*, 263 U. S. 137; *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 81–82; *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 217–218; *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69; *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123; *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77; *Wisconsin Gas & Electric Co.* v. *United States*, 322 U. S. 526, 530–531. Cf. *Armour & Co.* v. *Virginia*, 246 U. S. 1; *St. Louis & E. St. L. E. R. Co.* v. *Missouri*, 256 U. S. 314, 318; *Rowley* v. *Chicago & Northwestern R. Co.*, 293 U. S. 102; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 138–140; *Nippert* v. *Richmond*, 327 U. S. 416, 423–424. The same principle applies to individuals engaged in business within the state. *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1; *Shaffer* v. *Carter*, 252 U. S. 37; *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60. See also *Haavik* v. *Alaska Packers Assn.*, 263 U. S. 510, where license and poll taxes were imposed on an individual who was working in Alaska but was not a resident or domiciliary there.

[19] Compare *Norton Co.* v. *Department of Revenue*, 340 U. S. 534, with *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, and *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 309 U. S. 70.

[20] Compare *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 180–181, with *General Trading Co.* v. *State Tax Comm'n*, 322 U. S. 335; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373, and *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62.

SUPREME COURT OF THE UNITED STATES

No. 160.—October Term, 1953.

Miller Brothers Company, Appellant, *v.* State of Maryland.	On Appeal From the Court of Appeals of Maryland.

[April 5, 1954.]

Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Black and Mr. Justice Clark, concur, dissenting.

The States have been increasingly turning to sales and use taxes to raise the revenues they need to educate, protect, and serve their growing number of citizens. Unless the States can collect a sales or use tax upon goods being purchased out-of-state, there is a fertile opportunity for the citizen who wants state benefits without paying taxes to buy out-of-state. And there are just-across-the-state-line merchants who capitalize upon this opportunity. After today's decision there will be more.

I see no constitutional difficulty in making appellant a tax collector for Maryland under the general principles announced in *General Trading Co.* v. *Tax Commission,* 322 U. S. 335. When appellant's sales clerks make out the sales slips and arrange for the shipment of the purchased goods, they surely will know which are destined for Maryland, which for some other State. Hence to make appellant add the Maryland use tax to the bill when the purchaser requests that the goods be shipped to Maryland is only a minimal burden. Appellant will be paid for its trouble.[1] If liability were sought to be imposed

[1] The Maryland statute provides that the vendor-collector may retain 3 percent of the gross tax as compensation for collection and remittance expenses. Flack's Md. Ann. Code, 1951, Art. 81, § 384.

under circumstances indicating that appellant had been taken by surprise or treated unfairly, different considerations would come into play. But appellant in this case pleads immunity, not ignorance of the Maryland law nor harshness in its application.

This is not a case of a minimal contact between a vendor and the collecting State. Appellant did not sell cash-and-carry without knowledge of the destination of the goods; and its delivery truck was not in Maryland upon a casual, non-recurring visit. Rather there has been a course of conduct in which the appellant has regularly injected advertising into media reaching Maryland consumers and regularly effected deliveries within Maryland by its own delivery trucks and by common carriers.[2]

Jurisdiction over appellant in this suit was obtained when its motor vehicle was attached while it was being used in Maryland. *Pennoyer* v. *Neff*, 95 U. S. 714; *Ownbey* v. *Morgan*, 256 U. S. 94. If appellant chooses to keep out of Maryland entirely, then the Maryland courts will of course have no jurisdiction over it. But as long as appellant chooses to do some business there, I see nothing in the Due Process Clause which would prevent Maryland from making it a collector for taxes on sales which appellant knows are destined for Maryland homes.

---

[2] The parties stipulated that appellant advertises in Maryland, both by Delaware newspapers which circulate across the state line and by direct mail to Maryland customers. It was also stipulated that, over a four-and-a-half year period, at least $12,000 worth of merchandise was sold by appellant to Maryland purchasers for Maryland use. Approximately two-thirds of this merchandise was delivered by appellant to its Maryland customers in a motor vehicle owned and operated by appellant.